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**Citation: Pasquali, Paola (2018) Shifting borders, law and human mobility in the European Union and in China. [Thesis] (Unpublished)**

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**Shifting Borders, Law and Human  
Mobility in the European Union and in  
China**

**Paola Pasquali**

**School of Law, Birkbeck College, University of  
London**

**Submitted for the degree of Doctor of Philosophy**

**October 2017**

## **DECLARATION AGAINST PLAGIARISM**

I confirm that all text and analysis contained in this thesis, unless otherwise attributed and acknowledged, is my original work.

Paola Pasquali

## **Abstract**

Securing external borders and combating irregular migration currently rank among the top priorities in EU migration management and are often quoted as evidence of a growing securitisation of (non-EU) migration. On the contrary, despite increasing numbers of both internal and international migrants, border enforcement in China has been relaxed over the last decades. This thesis presents new insights on the current trend of securitisation of non-EU migration characterising the European context through a comparative study of China's migration regime.

The thesis begins with a rebuttal of the commonly held notion that borders are territorial or natural entities. Drawing on Foucault's notion of governmentality as a mode of operation of government which has the population as its main target, I argue that borders exist as processes governing the mobility of populations. I adopt a definition of borders as shifting conglomerates of laws, policies and measures operating as obstacles or incentives to mobility across politico-legal spaces. I further posit a comparative legal perspective with China as the most apt way to gain a fresh perspective on borders and their securitisation in the EU context.

The comparative enterprise commences with an outline of the recent history of migration legal frameworks and categories of mobility in the European Union. The narration identifies a growing trend of securitisation of (non-EU) migration as a correlate of the abolition of internal border controls as well as of the constitution of EU citizenship. I further postulate that as humanitarian and security concerns are currently the main currencies in EU migration management, the way in which the latter operates has deep economic underpinnings which are not openly articulated in legal and policy discourse. I then pan to the recent history of China's migration regime and categories of mobility. The account reveals how from severe restrictions on internal and international migration during Maoism – where unplanned

migration was perceived as a security threat to the socialist state – the management of migration has recently shifted to a more liberal approach as a result of China’s transition to a socialist market economy. I also highlight how the overall de-securitisation of migration in the Chinese context has been driven by an open, at time ruthless, pursuit of economic growth as the main policy goal in migration management.

The comparative account on migration management in the two contexts leads me to identify a forthright economic approach to migration management in the Chinese case as opposed to a tacit market approach to the management of migration in the EU context, where humanitarian discourses and security concerns have become the two main categories through which non-EU migration is framed. Tackling the issue of migration predominantly as an economic matter, China’s current migration system stands as an alternative to the present conventional wisdom framing non-EU migration as a security matter in the EU context. The counterpoint of the Chinese migration regime further allows for a better understanding of the very dynamics at play in the continuation of the securitisation trend.

**Keywords:** Borders, Human Mobility, Governmentality, Foucault, Migration Management, Comparative Law, European Union, China, *Hukou* System, Internal Migration, Neoliberalism.

## Acknowledgements

This thesis was written with the financial support of Birkbeck School of Law (Ronnie Warrington Scholarship) and of China-EU Law School at China University of Political Science and Law (CLTE First Class Scholarship and Visiting PhD of Law Scholarship).

I am grateful to my original supervisor Peter Fitzpatrick for his engagement with earlier versions of this project. My current supervisor Nadine El-Enany guided me through the last stages of this doctoral path. Her support has been fundamental to articulate this thesis' main argument and to regain confidence in its value. Juan Amaya-Castro has been supportive of this project from its early days and his in-depth feedback in the final stage of writing was of great help. At Birkbeck, I am grateful to Patricia Tuitt, Zeina Ghandour and Tara Mulqueen for comments on earlier versions of Chapter I. Over the years, I was also lucky to share parts of this journey with PhD fellows Başak Erturk, Soo Tian Lee, Tara Mulqueen, Carolina Olarte Olarte, Lisa Wintersteiger and many others. At China University of Political Science and Law, I am thankful to Qiqi Fu, Cui Ming Ma and Fumin Zheng for their enduring friendship and discussions; to Bjorn Ahl, Qian Hao and Shoudong Zhang for their academic support and guidance. Ever since our time as undergraduate students, Chiara Aimi, Vanessa Azzeruoli and Elisa Cavatorta have engaged with my writings and are among a long list of friends who never ceased to support me to get this thesis done.

Last but not least, this thesis would have not been possible without the support of my family. The long-distance presence of my parents, Nelly and Renato, and my siblings Laura and Sandro, has been a bedrock during the last years of itinerant writing. I am thankful to my husband Kwabena for lending his sharp acumen to test this thesis' arguments countless times and for enduring second place to "the thesis" on many occasions. Our son Achille Kwaku made the last stages of writing longer but fun. This work is dedicated to the memory of my father, Renato Pasquali, who imparted me the values of labour and social justice.

In memory of Renato Pasquali

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## Introduction

Whether to pursue better education and job opportunities or simply to join a loved one, being a passport holder of a developed country has greatly facilitated the execution of my choices to move to different countries over the last decade. Other migrants face similar dilemmas but enormously greater legal impediments, even within their own state. This awareness has driven my interest in the different ways politico-legal systems control human mobility.<sup>1</sup> In this thesis, the joint consideration of two different migration systems, namely the European Union (EU) and China, will help to achieve new insights on the state of borders and their management in contemporary EU, where non-EU migration is currently the object of growing security concerns.

### *1. The problem*

The 2015 so called EU migrant crisis - leading to the reintroduction of internal border controls and fences in many Member States – is perhaps the latest example of what scholars have described as a trend of securitisation of (non-EU) migration (Guild and Baldaccini 2007, Guild 2009, Andreas 2003, Bigo 2000, 2002, 2005; Huysmans 2000 and 2006; van Munster 2009). In 2014, at around the same time internal borders were re-established as an emergency measure between some EU Member States, a landmark *Opinion* by the Chinese government gave a substantial push to the erasure of its

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<sup>1</sup>For a matter of convenience, I shall use the words “migration” and “human mobility” interchangeably in the rest of this thesis. I prefer the latter over the former for the expression human mobility indicates that population movement is a constant pattern – rather than an exception - in human history. On the contrary, in the EU context the term migration has increasingly come to designate an austere category, “denoting a paucity of the social embeddedness that citizenship offers, or what a path to citizenship through permanent residence offers” (Hansen 2017: 135). The interchange of the two throughout this work will act as a constant reminder of the fact that population movement is a normal occurrence in human history.

internal borders by mandating that the distinction between rural and urban *hukou* - which had defined the administration of its gargantuan population until then – should be gradually abolished.<sup>2</sup> Similar to a system of internal passports, China's household registration (*hukou*) system has notably been a key instrument in the administration of China's population, demarcating a regime of internal borders and administrative areas which shares many commonalities with the restrictions enacted by international borders.<sup>3</sup> With 292 million internal migrants affected by this system, the numbers of internal migrants in China impressively exceed the total of the world's international migrants, estimated to be at 244 million.<sup>4</sup> International migrants are also present in the China and over the last three decades their presence has exponentially grown as a result of China's opening up to the outside world in the Reform era.<sup>5</sup>

The overall situation of migration management in the Chinese context strikes as opposite to the EU context. In the latter, fight against irregular migration and the security of EU external borders appear as the current top

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<sup>2</sup>Branigan, T. "China reforms *hukou* system to improve migrant workers' rights", The Guardian, 31 July 2014, <https://www.theguardian.com/world/2014/jul/31/china-reform-hukou-migrant-workers> Accessed 5 September 2017. It should be noted that while some Western media misunderstood this policy declaration for the cancellation of this system as a whole, scholars and more accurate reporters welcomed this measure as both a semantic reform and a substantive progress whose true impact remained to be seen.

<sup>3</sup> Although the *hukou* system has a millennial history, China's current household registration system was instituted in 1958 along the administrative distinction between urban and rural household registration, which divides Chinese citizens into different categories according to their birth location. The workings of such system will be explored in detail in Chapter III of this work.

<sup>4</sup> Statistical Communique of the People's Republic of China on the 2016 National Economic and Social Development, 28 February 2017, National Bureau of Statistics of China. [http://www.stats.gov.cn/english/pressrelease/201702/t20170228\\_1467503.html](http://www.stats.gov.cn/english/pressrelease/201702/t20170228_1467503.html) Accessed 5 March 2017. The United Nations International Migration Report estimated the total of the world's international migrant population at 244 million in 2015. See United Nations, Department of Economic and Social Affairs, Population Division (2016). [http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015\\_Highlights.pdf](http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf) Accessed 5 September 2017

<sup>5</sup> This trend is attested by the increasing choice of migrants from the global South to move to China instead of countries in the global North, attracted by its comparatively less restrictive visa policies.

priorities in the management of non-EU migration. Within such context, the only logical answer to even small increases in migratory flows has become “more security”. Security concerns – which most recently have started to be paired with humanitarian concerns - have come to monopolise politico-legal discourses of migration management. In other words, the issue of security has become the default way of thinking about (non-EU) migration in the European context. The Chinese context presents us with a different scenario. Despite growing numbers of migrants, their management has been characterised over the last decades by what could be described as an overall de-securitisation of migration. As will be discussed at length in Chapter III of this thesis, the latter has been the result of the country’s transition to a socialist market economy which radically shifted from a principle of opposition of class struggle to the pursuit of economic growth as the main principle orienting migration management.

As a nation state which limits the internal mobility of its own citizens, China might appear as a somewhat backward exception to the “norm” of free movement for citizens within national boundaries characterising the contemporary state system (Torpey 2000: 9). If one adopts this lens, the liberalisation of China’s internal borders has been indeed long overdue. Yet, if instead of focusing solely on the control of human mobility across national borders we look at the sheer size of China’s 1.3 billion population and the number of those affected by its internal migration system, another picture emerges. China has more migrants than the whole of world’s international migration. As *hukou* system expert Fei Ling Wang reasonably argued, if the contemporary global realm was a single political unit, its immigration laws and policies would reveal the same purposes and effects of China’s administrative borders (Wang 2005: 31). China’s experience can thus offer lessons and policy implications for other countries, including developed nations (Ibid).

One of the main assumptions of this work is that it is more fruitful to focus on how populations and their mobility is governed – regardless the national, sub-national or supranational connotation of the borders in question – rather than on instances of borders simply because they share the same national connotation. For the latter often obfuscates more than it does reveal. For example, China's provinces alone have a size of the population that is larger than most nation states. Taken individually, provinces such as Sichuan or Guangdong have a bigger population than countries such as the United Kingdom or Germany. These numbers compel us to put into perspective migration statistics in the EU: according to the latest statistics available for example, in 2016 some 54.4 million migrants between EU and non-EU citizens<sup>6</sup> resided in the EU as opposed to China's 292 million internal migrants. Regretfully, migration management in these two contexts has been very rarely compared, probably owing to the sub-national connotation of China's migration system.<sup>7</sup> Contributing to fill this gap, this work offers an original contribution to EU migration law studies, which are either solely focused on the EU context or limit themselves to comparisons among EU Member States or between the EU and migration systems in the global North.

A pressing concern that shapes this multi-sited investigation of borders and migration regimes is indeed also to exit the Euro-American centrism that normally characterizes studies on migration. While the focus on one's own context is to be expected - after all, even the most abstract and universal of theories ultimately originates from its theorist's experience of a specific political space (Galli 2001) – comparative perspectives, and

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<sup>6</sup>[http://ec.europa.eu/eurostat/statisticsexplained/index.php/Migration\\_and\\_migrant\\_population\\_statistics](http://ec.europa.eu/eurostat/statisticsexplained/index.php/Migration_and_migrant_population_statistics) Accessed 5 September 2017

<sup>7</sup> In English speaking literature, few exceptions are Pries (ed.) 2013 who compares boundaries of belonging in China and EU countries from a sociological perspective, Kovacheva et al. 2012, who compare EU Countries nationals' migration within the EU and China's internal migration from the perspective of social rights. From a labour economics perspective, a pioneer study by Cheng et al. 2014 compares inter-migration within the European Union and China.

particularly uncommon ones, can enable better understandings of one's own context.

With its gigantic population, China is not a typical nation state. As already mentioned, the peculiarity of the Chinese case is that it is characterised by internal borders of migration as the *hukou* system ascribes a different legal status to its citizens according to their birth registration. The distinction between agricultural and non-agricultural status defines a citizen's relationship with the state, as well as the eligibility for a range of state-provided benefits (Josephs 2011:298). On the other hand, the EU is a supranational entity which is often considered as a step beyond the nation state, having instituted free movement and establishment for EU citizens across Member States. The European experiment has nevertheless shown that "a world with open borders would not be a world without borders" (Bauböck 2007: 400), given that the external borders towards non-EU citizens have been notably strengthened.

Both the EU and China have been described - in separate contexts - as "migration regimes"<sup>8</sup> and are characterised by internal and external borders. My assumption is not only that these two migration regimes are comparable, but also that a comparison with China's migration regime can valuably elucidate aspects of the EU migration regime which would not be detectable when considering it by itself or when comparing the latter with more similar migration systems. It should be stressed that the purpose of this thesis' comparative outlook is not to carry out an assessment of which system presents with the fairer or most desirable migration regime. Such an evaluation would make little sense given the different conditions, economic levels and histories of the two contexts. Rather, the goal is to gain new insights on current trends of migration management in the EU through the

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<sup>8</sup> See, for China: Fan 2008, Nyiri 2010, Josephs 2011, Xiang 2007. For the EU, among many: Rigo 2007, Amaya-Castro 2011, De Genova and Peutz eds. 2010, Guild and Mantu eds. 2011.

lens of the Chinese perspective. I like to think of this work as a return trip from Europe to China.

The main hypothesis with which I started this work is that the diverging trends in migration management in these two contexts – securitising migration in the EU and de-securitising migration in China - could be traced back to different historical legacies. My comparative inquiry confirmed this hypothesis. With its open, at times ruthless, pursuit of neoliberal economic growth as its main policy goal, China's migration regime further shed light on how the EU migration regime remains for the most part ambiguous regarding the connection between migration and its economic role, its uses or benefits. This is so despite the deep economic underpinnings of the EU migration system. My argument in this thesis unfolds through the following research questions:

- i. What do we understand as borders and their securitisation in the EU context?
- ii. Why a comparison, and why specifically a comparison between China and the European Union, is an apt way to achieve a better understanding on current trends of migration management in the EU?
- iii. How have borders evolved in the European Union and what are the main features of the current management of migrant populations in the EU?
- iv. How have borders evolved in China and what are the main features of the current management of migrant populations in China?
- v. Which convergences and divergences emerge from this comparative outlook between the EU and China and what new insights can be learned about EU migration management?

## 2. *Theses*



- i. Borders are not to be understood as geographical nor national givens, but rather as shifting conglomerates of laws, policies and measures operating as obstacles, impediments or incentives to mobility across politico-legal spaces at various levels (sub-national, national, supranational). In adopting this definition, I advocate for a focus on the management of populations and their mobility, shifting the attention from national demarcations of borders to the governmentality of migrant population management at different administrative levels. Within this framework, the tendency of securitisation of borders in the EU is to be understood as a restrictive and control oriented approach which is being pursued to a significant extent through legal and policy frameworks regulating migration. In such context, comparative legal perspectives – especially those between very diverse legal systems – present the opportunity of gaining different viewpoints on one's own context. By doing so, they also have the potential to reveal aspects that are normally taken for granted when considering only one's own context.
- ii. China as a case of comparison is significant because due to its huge internal migrant population, it can offer lessons on how to cope with growing numbers of migration in the EU. Moreover, China's trend of de-securitisation of migration over the last decades is relevant as it runs opposite to the increasing securitisation of non-EU migration in the European context. China's inverse tendency stands as an alternative to the currently predominant notion that growing numbers of migrants necessarily call for more security measures. Thirdly, the

consideration of China's internal and external borders widens the scope of comparative studies with the EU migration regime, which normally only refer to other migration regimes in the global North as terms of comparison. Fourthly, the selection of China allows for an investigation of borders beyond the yoke of methodological nationalism.<sup>9</sup> Lastly, a comparison between migration management within an authoritarian political system such as China and within a supranational entity composed of liberal-democracies such as the EU allows to investigate the institution of borders beyond the different immediate facades of politico-legal systems.

- iii. The recent history of migration legislation in Europe shows that the increasing securitisation of (non-EU) migration has emerged as a correlate of the abolition of the internal border controls instituting the EU internal market. The securitisation of non-EU migration has further been instrumental to the very definition of EU citizenship and appears to be oriented by an underlying economic rationale which accepts hyper skilled or high waged migrants while rejecting low waged migrants as dangerous for host societies. Nevertheless, the economic underpinnings of EU migration management are not clearly stated in legislation and official language as humanitarian and security concerns currently dominate the scene of migration management in the EU.
- iv. The historical perspective on China's internal and external borders highlights a general tendency to de-securitise both

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<sup>9</sup>Wimmer and Schiller have defined methodological nationalism as that pervading assumption within social sciences that the nation state is the natural social and political form of the modern world (Wimmer and Schiller 2002: 327).

internal and international migration over the last thirty years or so. The trajectory of de-securitisation characterising China's internal and international borders has been intertwined with China's pursuit of economic development as the government's main policy goal and source of legitimation for political power. Particularly in the case of internal borders, this straightforwardly economic approach to migration management has also led to an open acknowledgement of the role of migrants for China's economy in legislation and official language.

- v. In spite of several diverging trends in migration management in the EU and China, both migration systems appear to be characterised by a similar economic rationale that derives from their embeddedness within neoliberal economy. The comparison with contemporary China, characterised by a forthright economic approach to migration, sheds light on the lack of an open articulation of the economic dimension of non-EU migration in Member States' official and public discourses. This lack of articulation feeds into the conceptualisation of movement into the EU as a security issue which is deemed legitimate only when it is framed in terms of humanitarian protection.

### *3. Limitations*

While Chapter I will discuss at length the methodology and scope of this work, it is worth outlining here in brief its limitations. The first is that my analysis does not delve into the migration and citizenship nexus. Various scholars have importantly reflected upon such nexus in both the European and Chinese contexts and illustrated from different perspectives how the issue of migration discloses the limits of current theories and existing forms

of legal citizenship.<sup>10</sup> The migration/citizenship perspective also importantly reveals how the politico-legal theorising of membership of contemporary political communities is predominantly defined on a territorial basis and is characterised by a bias towards the sedentariness of the population (Rigo 2007 and 2011). Although the European Union to some extent creates a different logic of belonging for EU citizens, as shall be seen in Chapter II, it is based on the same exclusionary logic as national citizenship towards non-EU migrants (Rigo 2007, Balibar 2003, Lindahl 2009). The migration citizenship nexus in the Chinese context further enriches and complicates the picture. Similarly based on the territorial principle, the *hukou* system enacts different degrees of citizenship for nationals of the same state based on their territorial affiliation and a similar bias towards sedentariness. These divisions trigger debates about the meaning of citizenship beyond its legal definition, as a contested practice, defined by acts rather than a legal status that is assigned from above by law (Isin and Nielsen 2008, Nyers 2006). This framework has been employed and expanded through analyses of the Chinese context of migrant NGOs' activism (Jakimow 2015). Although a very interesting avenue for enquiry, the analysis of the migration and citizenship nexus as well as the notion of citizenship as practice from below will not be part of this thesis, which for practical reasons will stop at a citizenship from above approach, looking at how governments frame migration through legislation and policies.

Secondly, this work does not explore nationalism or ideas of nation and belonging attached to them and how they play a role in border formation and migration management. It could be in fact argued that this work deliberately ignores discourses of national belonging and all those elements that build up nations as imagined communities. This is not to imply that perceptions of national belonging do not matter in our imaginations or do not impact on the functioning of world politics. Yet, as argued above, my

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<sup>10</sup> For the Chinese context see for example Solinger 1999, Jakimow 2015, Guo 2014. For the EU context see Rigo 2007, Zagato ed. 2010, Sciurba 2009, Isin and Nielsen eds. 2008.

assumption is that it is more fruitful to focus on how populations and their mobility is governed – regardless of the national, sub-national or supranational connotation of the borders in question – rather than on instances of borders because of their shared national connotations. The hope is that such neglect of national determinations will help to expose dynamics that are usually hidden behind national ideology and methodological nationalism.

A third drawback of this thesis is that it does not touch upon the connection between migration regimes and racism.<sup>11</sup> This connection is deeply present in both contexts of analysis and follows different logics, which have their own histories. As scholars have noted, the racial hierarchies upon which European colonialism was based re-emerge in various forms and are complemented by narratives of migrants as victims whose lives are somewhat less important than those of “civilized” Europeans (Cuttitta 2015). In spite of this, the literature on the securitisation/criminalisation of migration in the EU is for the most part neglectful of the way in which migration legal frameworks are productive and reproductive of racial categories (El-Enany, forthcoming 2018).

The Chinese context is also characterised by different but equally influential forms of racism. One pertains to the traditional perception of superiority of the Han ethnic group,<sup>12</sup> not only compared to other ethnic groups in China (Law 2012) but as the most superior and civilised culture in

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<sup>11</sup> I understand the notion of racism here as “the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death” (Wilson Gilmore 2006:28).

<sup>12</sup> Although China’s national narrative concentrates on the union of fifty-six ethnic groups recognised in the Constitution, the overly predominant (90 percent) Han ethnic group has been historically at the centre of a racial discourse based on the notion that the Han are superior to the other minority groups. While most of these ethnic groups currently have peaceful relations with the Han majority, two notorious exceptions are the Uighurs and Tibetans, pushing for more autonomy or independence at the bordering regions of the Chinese state. Seen as a matter of security of national borders, the Chinese government has historically responded to such pressures by encouraging migration of Han into such areas.

the world (Dikötter 1992).<sup>13</sup> Hierarchies further exist within the Han group and pertain to the racialisation of rural migrant labourers (*mingong*) based on the binary urban citizen versus peasant institutionalised by the *hukou* system (Han 2009). Rural *hukou* holders are normally depicted as being characterised by a low individual quality (*suzhi*) and in need of improvement.<sup>14</sup> As a marker of peasants' low quality is dark skin tone, scholars have noted that relational connections exist in Chinese perceptions of rural peasants and people of colour, as documented by experiences of Africans in China since Mao's era (Law 2012: 112).<sup>15</sup> More generally, mono-ethnicity appears to be a constant and problematic leitmotiv in Chinese perceptions – a product of a long history of relative isolation - which can be further detected in the rarity of naturalisations of foreign nationals as well as in the government's consideration of ethnic Chinese as Chinese in spite of their foreign passports. Although an intrinsic element in the government of migration, for reasons of scope of my enquiry this work will not explore the link between questions of race/ethnicity and migration legal frameworks.

#### 4. *Outline of chapters*

The argument that despite the deep economic underpinnings of the EU migration regime, the pursuit of economic growth through migration management in the EU context is not an outspokenly enunciated policy goal

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<sup>13</sup> This perception is reflection in the word "China", which in Chinese language is "*Zhongguo*" literally translating as Middle Kingdom or The Centre of the Universe. This reflects China's long-standing perception of itself as superior to other civilisations and cultures.

<sup>14</sup> *Suzhi* is a fundamental keyword of contemporary Chinese popular and official discourses. The word refers to "the innate and nurtured physical, psychological, intellectual, moral, and ideological qualities of human bodies and their conduct" (Jacka 2009: 534). It is currently referred as a measure for the "quality" of individuals and divides individuals into those with low *suzhi* and those with high *suzhi*. While to some extent the notion of "race" converges with the concept of *suzhi*, the latter is something that is more malleable, for *suzhi* can be increased through education and other "civilising" initiatives, aimed at making rural migrants more trained for the labour market and thus also more governable (Xu 2009; Yan 2003).

<sup>15</sup> During Maoism, while in China racism was publicly labelled as a Western problem as the PRC championed as leader against 'white imperialism', the state was also marked by distant patronising attitudes towards "inferior", "ugly," dark people (Dikötter 1992).

as in the case of the Chinese migration system will be gradually substantiated through a detailed politico-legal analysis of the two migration systems.

Chapter I introduces the methodology and theoretical framework of such analysis. It begins with a rebuttal of the common-sense notion that borders are territorial or natural entities. In its place, Foucault's notion of governmentality, as a new mode of operation of government in the modern era which has the population as its main target (Foucault 2007) is put in conversation with the issues of borders and migration. As a result, I define the borders investigated in this thesis as shifting legal processes governing migration which are made of conglomerates of laws, policies and measures and operate as obstacles, impediments or incentives to mobility across politico-legal spaces. I further define the securitisation of migration in the EU context as a process which is observable within legislative measures, policies and official statements which in various ways restrict free movement and constructs migrants as potential threats. I then move to explain why a comparative legal perspective with China can be beneficial to current understandings of borders and their securitisation in the EU context. After that, the chapter delves into the "how" of the comparison, drawing attention to the epistemological biases and challenges existing when dealing with non-Western legal contexts from a Western perspective.

Chapter II traces the recent history of the EU internal and external borders through legislation and policies. The dynamics of the EU's external borders are observed at both the EU level and then more concisely in one national case, Italy. The narration progressively individuates a correlation between the increasing levels of securitisation of (non-EU) migration, the abolition of internal border controls as well as the constitution of EU citizenship. The joint consideration of the history of EU migration policies and the legal categories through which migration is currently defined as such and channelled further exposes the deep economic underpinnings of the EU migration regime. I argue that despite its underlying economic rationale,

contemporary EU migration management lacks an open articulation of the connection between neoliberal economic growth and migration management in its legal and policy discourses, which are instead dominated by humanitarian and security concerns.

Chapter III begins with a short introduction on China's legal system and its main characteristics. It proceeds with the historical outline of the legislation and policies constituting China's internal and external borders. This is followed by a consideration of the legal categories through which migration – internal and international - are presently defined and channelled in the Chinese context. While the narration is mainly focused on the level of central government, the chapter succinctly explores also the implementation of internal borders at the level of local government in Beijing. The chapter progressively exposes that from a severe restriction of internal and international migration during Maoism – where spontaneous migration was perceived as a security threat to the socialist state – the management of both internal and international migration in China has shifted to a more liberal approach following the country's transition to a socialist market economy. This general tendency of de-securitisation of migration has been driven by an open pursuit of economic growth as the main policy goal and has been forthrightly enunciated in legal and policy documents.

Chapter IV summarises and discusses the outcomes of this thesis' comparative account of borders in the EU and in China. It first enunciates the main divergences and convergences between the two contexts. I individuate as the main convergence the pursuit of an economic rationale in migration management in the two contexts and note how this rationale has been coupled with a growing securitisation of migration in the EU context, and with an overall de-securitisation of migration in China. I thus identify two different approaches in migration management in the light of the comparative perspective: a forthright approach to migration and its capitalisation in the Chinese case and a less transparent pursuit of economic



goals in EU migration management. In the latter, although notions of protection and risk as related to non-EU migrants are heavily influenced by economic considerations, security and humanitarian concerns currently dominate the official language and legal categorisations of non-EU migration. Tackling the issue of migration predominantly as an economic matter, the counterpoint of the Chinese case dramatically stands as a reminder of the arbitrariness of legal categorisations and their impact on the way in which migration is popularly perceived and managed. The comparative perspective further leads me to hypothesise that the centrality of humanitarian concerns in contemporary EU migration management contributes to the occlusion of the economic rationale that orients its migration-related legislation and policy making. The chapter ends with a consideration of possible future scenarios and the consideration that current trends in the two contexts might continue or reverse.

## CHAPTER I

### Securitising Borders of Migration and the Benefits of a Comparative Perspective

横看成岭侧成峰，  
远近高低各不同。  
不识庐山真面目，  
只缘身在此山中。

《题西林壁》苏轼

Seen from the front it is a mountain ridge  
Seen from the sides it is one towering peak.  
The view changes from far or near, high or low.  
I do not know Mount Lu's true shape  
This is because I am in the midst of the mountain.

*Su Shi, Inscription on the Wall of Xilin Temple*

#### *Introduction*

This thesis is an attempt to yield new insights on current processes of securitisation of borders in the EU by way of comparing them with migration management in China, which over the last decades underwent a trend of de-securitisation of migration. This task is not an easy one. Comparative perspectives complicate rather than facilitate analytical investigations. This is so because different contexts never fully match and often make academic arguments appear less analytically consistent or necessitating further explanations which would not be needed when dealing with one context. It is perhaps partly to avoid these analytical limitations that most studies on borders and migration normally deal with one case study at a time: however, by doing so, one-study approaches miss out on the theoretical gains that can be yielded through comparisons (Walters 2013: 209). Nevertheless, as the epigraph above beautifully put it, the best way to know the “true shape” of mount Lu is not to remain in

its interior, but by exiting it, as distance from it enables one to catch a better sight of its form - even if a unitary view of its shape is ultimately unattainable. A similar awareness characterises the methodological approach in this work and will be specified throughout this chapter. On the one hand, a comparative view is adopted to achieve a better understanding of the EU reality. On the other, this comparative perspective is only one partial grasp of this reality, which is unavoidably determined by the observer's position.

The chapter begins with a rebuttal of the common-sense assumption of borders as geographical or natural entities. In its place, it emphasises borders' key function of controlling populations and advances a working definition of borders as legal processes governing migration which operate as obstacles, impediments or incentives to mobility across politico-legal spaces. It then specifies the notion of securitisation of migration. The second part moves to explain why a comparative legal perspective can be beneficial to current understandings of borders and their securitisation in the EU context. This is followed by the reasons in support of a comparative selection specifically with China. After that, the chapter delves into the "how" of the comparison, drawing attention to the epistemological biases existing when dealing with non-Western legal contexts from a Western perspective. The chapter ends with few methodological caveats which will inform the rest of the work.

## PART I. DEFINITIONS

### *1. Refuting the geographical-territorial assumption about borders*

In an essay on the notion of the border, philosopher Balibar remarks that any simple definition of a border will be absurd (Balibar 2002: 76). The reason for that, Balibar claims, is rather ordinary: when looked at

from an historical perspective, borders cannot be assigned with an enduring substance. Looking at the borders of Europe from an historical viewpoint, he notes the abyssal difference between the borders of the Roman Empire and those demarcating XIX century European kingdoms, or between the borders promoted by XIX century European cosmopolitanism and the increasingly fortified borders drawn by the Schengen Agreements (Ibid: 75). More fundamentally, Balibar posits that “the very representation of the border is the precondition for any definition” (Ibid: 76). Changes in the configuration of political borders do not only indicate that borders are historically fluctuating entities; the impossibility of a fixedly a-historical definition of borders reflects more profoundly the mutable nature of any identity delimited by them.

While a philosophical perspective enables us to grasp this fundamental fact about borders, it is also true that even if the borders of nation states historically shift, before and after such shifts they continue to be considered territorially natural objects. In other words, contemporary borders are generally assumed to be natural, self-evident geographical entities, not only in popular common sense but also by various domains of social sciences, including legal and migration studies. Drawing on insights from critical geographers, this first section disproves the common assumption that borders are fixed because they are territorial. This move will set the scene for the working definition of borders which I will introduce later in the chapter.

One of the main common ideas about borders is that they are tangible, territorial entities. The inappropriateness of theorisations of borders as self-evident geographical lines has been highlighted by a postmodern tendency which has developed over the last twenty years within the field of borders studies (Kolossov 2005: 607-614). Going against traditional approaches to border studies, which focus on issues such as historical mapping, typologies, functionality or politics of (state)

borders within international relations and conceive of borders as self-evidently present entities, these postmodern accounts highlight borders' deep connectivity with what they exclude (Newman and Paasi 1998: 195). For example, some of these accounts concentrate on de-centring the border as an entity which "is never simply 'present', nor fully established, nor obviously accessible. Rather, the border is manifold and in a constant state of becoming" (Parker and Vaughan Williams 2012: 728). As a result, an emphasis on the process of bordering has been advocated, rather than on borders as outcomes of processes. (Newman 2006: 148). Accordingly, processes of borders' demarcation and management would be key to the definition of any border.

The process through which borders are demarcated and managed is central to the notion of border as process and border as institution. The demarcation and management of borders are closely linked to each other. The former (the process of demarcation) determines the way in which the latter (the management of borders) is put into effect (Newman 2006: 148).

While this quote importantly stresses how the institution of a border relies upon processes of demarcation and management, these characteristics are often concealed by the neutrally geographical status with which borders are normally apprehended. The neutrality of this status has been convincingly confuted among others by Delaney, who asserts that any territorial configuration is a political achievement (Delaney 2005: 11-12). The naturalness with which a territory is presented and taken for granted would be indeed a crucial aspect through which the creation of a territory, or else, "territoriality" works.<sup>16</sup> While it

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<sup>16</sup> Following Delaney, I understand "territoriality" as the mechanism through which a territory is established and maintained through practices of "drawing lines, bounding spaces, assigning meanings to these and assigning consequences to crossing lines" (Delaney 2010: 138).

is through such practices that a territory is continually maintained, in order for a territory to be successfully perceived as politically neutral and self-evident element these need to be out of sight (Delaney 2005: 11).

The suggestion is that when a specific territory is confronted with challenges to its existence - for instance when new national territories are created or national borders are contested - the arbitrariness and political implications of territorial arrangements come to light. The etymologies associated with the word 'territory' can further elucidate this point. From the Latin *terra* (land) and the suffix *torium* (belonging to or enclosing), the word *territorium* originally indicated the area surrounding a city over which the city government ruled (Dorsett and McVeigh 2012: 39, Elden 2013: 220-227). Connected to that, the etymology of the word territory is also being derived from the word *terrere* "to terrify", as an area within which the sovereign rules and has the fundamental right of expelling individuals (Dorsett and Mc Veigh 2012: 39, Elden 2013: xxxviii-xxx).

A study by Elden documents this evolution of the notion of territory (Elden 2013). By way of a survey among key Western thinkers from ancient Greece to the seventeenth century, the study exposes current understandings of territory to their contingency. Elden remarks that while in the modern understandings territory typically refers to a circumscribed space controlled by a group of individuals (normally a state), what has been understood at each historical moment by naturally bounded territory involved particular practices (such as mapping, cartography and statistical measuring) as well as politico-legal control over a certain terrain. The notion of modern territory is here derived from Michel Foucault's – whose work will be discussed in detail in the next section - as "first of all a juridical-political one: the area controlled by a certain kind of power" (Ibid: 9). Accordingly, territory "should be understood as a political technology or perhaps better as a bundle of political

technologies” (Ibid: 322). Political technology is to be grasped as a technique of governance which includes

... legal systems and arguments, political debates, theories, concepts and practices, colonization and military excursions; works of literature and dictionaries; historical studies, and the technical in the narrower sense – geometrical instruments, statistical handbooks, maps, land surveying instruments, and population controls. Territory is not simply an object: the outcome of actions conducted toward it or some previously supposedly neutral area. Territory is itself a process, made and remade, shaped and shaping, active and reactive (Ibid: 17).

Crucially, this argument advances a definition of territory (and by extension, of territorial borders) which leaves the question of territory open (Ibid: 323). The notion that the seeming natural status of borders is produced through techniques which continuously shape borders’ identity resonates with both Newman’s definition of borders as well as Delaney’s considerations about territoriality. If territory is not an essence but rather a process resulting from certain practices, the attribute of territoriality loses its alleged centrality within current interpretations of borders (including within legal definitions). In its place, political technologies such as law assume a key role. However, this claim cannot be fully understood without a more in-depth discussion of the processes which characterise contemporary borders. For this reason, the claim of the significance of legal frameworks to the institution of present-day borders is temporarily set aside to first suggest that another possibility of considering borders, as the next section explores, is to identify them as processes governing migrant populations.

## *2. Borders as processes governing migrant populations: a Foucauldian approach*

The rebuttal of traditional geographical approaches to borders as territorial and politically neutral entities in the previous section triggered the consideration that borders are better conceived of as processes enacted through a bundle of political technologies. This section ascertains more specifically these processes from the perspective of their fundamental function of controlling the mobility of populations. A key theoretical foundation of this notion as well as of this comparison is Foucault's notion of governmentality. By positing the population as the main tool and target of modern political power, this notion enables an understanding of the occurrence of modern state formation and its borders without taking the state as a natural or immutable element in the analysis.

Notably, the concept of governmentality was first introduced by Foucault in his 1977-1978 lectures at Collège de France as a new form of power, or else a new "art of government" within modernity (Foucault 2007: 143). In the triple definition provided, governmentality firstly designates "the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics" which enabling the government of the population (Foucault 2007: 108). Secondly, governmentality is to be seen as a "tendency" in Western history to develop "a series of specific governmental apparatuses" and "a series of knowledges" (Ibid). Thirdly, governmentality points to "the result of the process by which the state of justice of the Middle Ages became the administrative state in the fifteenth and sixteenth centuries and was gradually 'governmentalized'" (Ibid: 108-109). It is within the framework of this governmental regime that the concept of biopolitics can be also grasped as "the attempt, starting from the eighteenth century, to rationalise the problems posed to governmental practice by phenomena characteristic of a set of living



beings forming a population: health, hygiene, birth-rate, life expectancy, race” (Foucault 2008: 317). Governmentality and biopolitics are symptoms of the different modalities in which political power operates in the modern era.<sup>17</sup> In place of the pre-modern monarchical power of a sovereign over its subjects - as a power to punish and forbid - power in the modern era would be exercised over a population, as an entity that is “ruled by processes and biological laws” and who has “a birth rate, a rate of mortality, (...) an age curve, a generation pyramid, a life-expectancy, a state of health”, who can “perish or, on the contrary, grow” (Foucault 2007b: 161).

With the emergence of the population as the main subject of modern politics, political power would crucially need to cultivate political subjects and their well-being. A key way in which governmental power gets a hold of population(s) is the welfare state model which - despite its current vacillations - characterises the art of government of contemporary European states. As Foucault observes, the development of European states has been pursued since the seventeenth century in reliance both on military-economic growth - to compete with other states – and the specular goal of securing internal order by granting the wellbeing of its individuals (Foucault 2007: 474). Through the welfare state, governmental power provides and promotes the health and well-being of its population and in doing so fosters itself.<sup>18</sup> As Nielsen observed, the welfare state model affirmed itself in post-war European countries as a key tool to ease social tensions and promote internal cohesion by way of

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<sup>17</sup> While both governmentality and biopolitics describe a modality of administering the population in a way which maximises its life and self-government, in agreement with Golder and Fitzpatrick this work understands the difference between the two as “one of emphasis” (Golder and Fitzpatrick 2009:32). On the one hand, governmentality entails a focus on governmental strategies, technologies and historical evidence of the new phenomena of modern power, on the other, the notion of biopolitics serves to stress more broadly the management of life characterising these phenomena (Ibid).

<sup>18</sup> The notion of welfare state can also be related to what Foucault described as pastoral power - which traditionally characterised Christian church's art of government – as a benevolent power wielded over individuals in the form of care (Foucault 2007: 161-174).

promoting worker's well-being, but also, it has been a key tool to foster external strength against the spectre of international socialism during the Cold War era (Nielsen 2016, unpublished).

Despite Foucault's focus on the population, the connection between population management and borders is relatively unmentioned in Foucault's lectures. As a matter of fact, borders and migration are subjects which are cited within Foucault's governmentality lectures only *en passant*<sup>19</sup> and their connection with the notion of governmentality remains mostly unexplored in his work (Walters 2011: 140). Due to their most recent popularity, analyses connecting the issues of migration and borders with governmentality have nevertheless flourished.<sup>20</sup> One of the main insights connecting the two with governmentality is that the Foucauldian focus on the population enables us to see contemporary borders as a "privileged instrument to regulate national and transnational populations - their movement, health, and security" (Walters 2002: 571). Another oft-quoted Foucauldian inspired position is that the nation state's appropriation of the legitimate crossing of borders has enabled the very constitution of national populations. As submitted by Torpey, while Foucault's work on governmentality meaningfully sheds light on how states were able to appropriate and govern modern societies, it still lacks an engagement with how specifically a population is individuated and

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<sup>19</sup>For example, borders are mentioned by Foucault in relation to "the administrative state, born in the territoriality of national boundaries in the fifteenth and sixteenth centuries and corresponding to a society of regulation and discipline" (Foucault 2008: 145). Similarly, the issue of migration is hastily touched upon as an element making up human capital in the era of liberalism in one of Foucault's lectures on biopolitics (Foucault 2008: 130).

<sup>20</sup> See for example Walters (2002, 2011, 2015), De Genova and Peutz (2010), Mezzadra and Neilson (2013) and Salter (2007). The relevance and limits of using Foucault's toolbox in the analysis of borders *and* migration have been the topic of a recent scholarly conversation in the Foucault-themed Italian journal *Quaderni Foucaultiani* (De Genova, Neilson and Walters in Cremonesi et al. 2013). The use of Foucauldian concepts to analyse themes upon which Foucault himself did not touch upon is in line with his envisaging of theory as a "toolkit": an interpretive instrument which is to be modified and improved on the basis of situations, rather than a dogmatic or comprehensive theory (Foucault 1980: 145).

administered along the lines of nationality (Torpey 2000: 5). In his work documenting the invention of the passport in XIX-XX century Europe, Torpey shows instead how (national) populations in modern European states have emerged through a “monopolisation of the legitimate means of movement” (Ibid: 4).<sup>21</sup> Carried out to a significant extent through legal instruments such as passports and visas, this monopolisation would have not only granted nation states the “exclusive right to authorise and regulate movement” over populations (Ibid: 5-6). It would have also enabled the individuation and administration of a national population along the lines of nationality, by enacting the distinction between citizens and non-citizens (Ibid: 5).

Bigo and Guild have similarly remarked that being still working in a “national mindscape”, Foucault failed to see how policing can be pursued in the name of freedom of national citizens to the detriment of non-citizens (Bigo and Guild 2005: 3). While Foucault spoke of surveillance as something that was directed at the whole population indiscriminately, surveillance and control in migration management would be enacted to “sort out, filter and serialize who needs to be controlled and who is free from that control, because he is ‘normalized’”, in other words, migration surveillance would be constitutive of the very distinction between citizens and non-citizens (Ibid).

### *3. Governing through inclusion and exclusion*

Not only would surveillance mechanisms enact the distinction between citizens and non-citizens. Legal categorisations of the migrant population (i.e. regular/irregular status, long or short-term legal status, long-term residence or citizenship and so on) enact a “system of stratified

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<sup>21</sup>This expression echoes Karl Marx’s remarks on capitalists’ monopolisation of means of production and Max Weber’s famous considerations on the state’s monopolisation of means of violence; similarly, nation states would have monopolised and appropriated from individuals the legitimate “means of movement”, principally (but not only) across nation states borders (Ibid: 4).

rights” or “civic stratification” whereby the governance of migration takes place both through the granting and the withholding of rights (Morris 2003: 7).<sup>22</sup> According to this view, rights would be a tool of governance, understood in the Foucauldian sense. According to Morris,

[t]he granting of rights to non-citizens involves, in Foucauldian terms, the development of ‘political rationalities’ for inclusion or exclusion, while also extending the available ‘technologies of government’ through the institutional framework for their delivery... . In other words, the elaboration of rights for categories of non-citizen also provides the opportunity and the means for exercising surveillance and control (Morris 2003: 146).

These insights, connecting different degrees of citizenship rights with the management of migrants and local populations, importantly puts in the fore how legal categories of migration are to be conceived as a political technology to divide and govern populations based on differential allocations of citizenship rights.

Although not drawing on the Foucauldian grid, in his theoretical discussion of the *hukou* system Wang reflects upon the same mechanism of division through inclusion and exclusion of the population (Wang 2005). For Wang, all politico-social groupings are based on exclusions which enable the organisation of society and allocation of resources for its members (Ibid: 4). According to such perspective, institutions are not neutral in respect to the social realm: instead, as a manifestation of society, politico-legal institutions would be unavoidably promoting some sort of exclusion, “institutional exclusions” to be precise (Ibid). Wang

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<sup>22</sup> Morris develops the notion of “civic stratification” as described by Lockwood as a system of social inequality within the state which is both expansive and restrictive, in the context of migration management (Lockwood 1996 in Morris 2003: 7).

draws attention to the fact that the most common human grouping of the contemporary era, the nation state (and its corresponding international state system) is based on a division of the population based on a location-based type of exclusion, combining birthplace and family relations.<sup>23</sup> This type of institutional exclusion further characterises China's internal division of the population according to the *hukou* system, where every Chinese citizen is assigned at birth to a location to which corresponds a socio-political status and identity. While this criterion of division of populations is currently predominant and considered legitimate in the international realm, it is not considered so within nation states. This mechanism of assigning membership based on location and assignation at birth – typical of both the *hukou* system and national citizenship – has been notably likened by Carens to Middle Ages' feudal status: allocated at birth, generally unchangeable despite the person's will and efforts and with a huge impact upon that individual's life prospects (Carens 1992: 26).

This section's review of philosophical and sociological accounts of borders in their connection with populations and their mobility helps us to further see borders from the perspective of their fundamental function of controlling the mobility of populations. The next section discusses in more detail the role of legal and policy frameworks addressing migration and puts forward the working definition of borders which will be employed in the rest of the thesis.

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<sup>23</sup> Based on the observation of current politico-legal organisations, Wang identifies four types of institutional exclusion that determine different divisions of populations in different nations and historical periods (Ibid). According to Type One, populations are divided and institutionally excluded because of who they are in terms of their racial, ethnic, caste, linguistic, sexual, religious identity and so on. Based on Type Two, populations are divided and excluded based on what they have regarding their wealth or property. Type Two is the most widespread and enduring of institutional exclusions, as well as the most accepted, in that at least in theory it allows mobility among classes. Based on Type Three, populations are excluded according to where they are located in terms of their birthplace or family relations. Based on Type Four, the population is divided and excluded according to its conduct (loyal vs outlaw members) within a given society (Wang 2005).

#### 4. *A working definition of borders and their securitisation*

The notion of borders as shifting processes controlling the mobility, security and welfare of populations which has been progressively delineating in this chapter compels us to see the active role of migration and citizenship laws in the construction of borders. This approach is in stark contrast with mainstream migration legal studies, which assumes (national) borders as natural givens and views the restriction of migration as a natural consequence of it. El-Enany has individuated two main declensions of this position in the scholarship. The first one consists of “legal idolisers” who, fetishizing the law as the ultimate tool for seeking justice, fail to see the exclusionary function of migration law (El-Enany 2015: 9). Within this approach, particularly common among scholars of refugee and human rights law, the law is celebrated for its potential to empower migrants through the invocation of fundamental rights that can be enforced in courts of law (Ibid: 10). The second attitude characterises the so called “pragmatist-realists” who, accepting the reality of nation states’ need to restrain migration, seek incremental improvements in the condition of migrants by arguing for “more ethically sound responses to the movement of people rather than the abolition of border controls” (Ibid: 22). What all these accounts do not see is that migration law is instead continually constitutive of the same borders to which it refers, as critical accounts of migration law have variably remarked.<sup>24</sup>

In line with these considerations, in this work I define borders as shifting legal constructs or processes governing migration. These processes consist of shifting conglomerates of laws, policies and measures which operate as obstacles, impediments or incentives to mobility across politico-legal spaces. Such impediments or incentives may manifest as legal or policy conditions and modalities under which

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<sup>24</sup> Calavita 1998, De Genova 2002, Dauvergne 2008, Guild 2009, Mitsilegas 2015b, Amaya-Castro 2011, Rigo 2007.

individuals may access, reside, work or settle within a given politico-legal space. I further see borders as demarcated by migration law as filters: through different legal categories of mobility, they assign different degrees of citizenship rights and enable the division and governance of populations. The idea is that in migration management, legal categorisations and different types of visas work as “economic, political and cultural filters” (Gaibazzi 2014, unpaged), enacting what scholars have defined as “citizenship at variable geometry” (Zagato 2010: 219) in relation to a person’s status and her mobility.

Legal categorisations of migrants and their mobility determine extremely different experiences of borders, along a wide spectrum of governmentality of migrant populations which can range from the acquisition of citizenship to detention. I see these legal statuses as a product of the same governmental logic, and have to do with how political-legal units get a hold of their populations at a given time.<sup>25</sup> In contrast with mainstream migration studies’ notion that migration law is a consequence of fixed national borders, it will be clear by now that my definition does not see migration laws and policies as a second order effect of a world divided into nation states, but rather, as an apparatus that is partly constitutive of borders and the international system of states (Walters 2015: 14).

A similar constructivist approach characterises the notion of securitisation of migration in this thesis. Several migration and security studies scholars have spoken of a securitisation of migration in the EU context (Waeber et al. 1993, Andreas 2003, Lazaridis 2011, Bigo 2000, 2002, 2005; Huysmans 2000 and 2006; van Munster 2009, Bourbeau

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<sup>25</sup>This biopolitical dimension is however historically contingent. For instance, in the 19th Century, particularly in countries in the American hemisphere, newly formed nation states aimed at attracting immigrants rather than excluding them: immigration was seen as a way to increase the national population, and at times even to select this growth according to certain desirable ethnic characteristics (Amaya-Castro 2012).

2011, Baldaccini et al. 2007, Guild 2009).<sup>26</sup> While there seems to be a general agreement that a general trend of securitisation of migration is taking place in Europe and more generally in the global North, interpretations over the nature, the time frame, and the consequences of this phenomenon are extremely diverse and at times irreconcilable. For example, according to some, the events of 9/11 encouraged a securitisation of migration over concerns about terrorism (Andreas 2003; Lazaridis 2011). Others have argued instead that the securitisation of migration in North America or Europe started much earlier (Bourbeau 2011; Huysmans 2000; Kostakopoulou 2000, Baldaccini et al. 2007) or even, that it remained unaffected by the 9/11 events in the European case (Boswell 2007).<sup>27</sup>

The differences among these approaches derive from different conceptions of what is security and what are its effects in relation to migration (Huysmans and Squire 2010). Following the classification of such conceptions, two main understandings of the security and migration nexus have been identified. The first one, which characterises mainstream Security Studies and IR scholarship, considers security as a fact or a value to be achieved and by doing so it implicitly assumes the existence of a threat connected with migration (Ibid: 172). According to such views, migration could be a threat for the integrity of states - as a threat to its demographics, internal social cohesion, availability of the job market and

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<sup>26</sup> A classic definition of securitisation among security studies is that proposed by the Copenhagen School, according to which "securitisation" is to be understood as a process through which issues which are seemingly not connected to security are turned into pressing security matters by "speech acts" such as political speeches, reports, legislation, policies and so on. Security in this conception has a dual meaning: state security, principally linked with sovereignty over a territory, and societal security, dealing with "the ability of a society to persist in its essential character under changing conditions and possible or actual threats" (Wæver et al. 1993: 23). For the advocates of this view, migration emerges as a security problem when political elites and decision makers claim it to be as such through rhetoric, legislation and so on (Wæver 1995: 54).

<sup>27</sup> A narrower understanding of the notion of securitisation of migration is to see it as a direct association of migration and security or alternatively as a convergence between measures tackling terrorism and those tackling migration (see Boswell 2007 in Squire 2015).



so on (Loescher 1992, Rudolph 2006 in Huysmans and Squire 2010: 171).<sup>28</sup> A different understanding of security is advanced by critical security scholars, who view security as a practice, a type of knowledge, discourse or technology rather than a value or a condition to be achieved (Ibid: 172). According to such accounts, the politics of security, or better the “politics of insecurity” connected with migration (Huysmans 2006), would be a (contested) process rather than a predetermined value and would be embedded within other social processes (Huysmans and Squire 2010: 170). The notion of security as a process has been investigated through inquiries of sites such as migrant detention camps and border areas (Nyers and Moulins 2007; Bigo and Guild 2005; Salter 2008), the growing importance of security experts in migration management (Guiraudon 2003b) and the increasing use of security technologies (visas, asylum procedures and surveillance) in migration management (Bigo and Guild 2005; Salter 2003).

The securitisation of migration would be part of a “politics of insecurity” revolving around the dangers of migration (Huysmans 2006), employed by national governments to increase their ability to control the national population. According to this view, which once again relies upon Foucauldian insights, processes of securitisation of migration constitute a key “transversal political technology” for governments and institutions to govern their own populations, by first creating threats from which national populations can then be protected and reassured (Bigo 2002: 65). This type of government is based on the construction of fear as well as on the anticipation of risks for the polity. As Bigo put it,

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<sup>28</sup> An alternative declination of this same idea of security understands migration as a threat to the individual security of migrants rather than national security. This approach coincides with a humanitarian take that has been advocated in relation to the security of refugees, asylum seekers and trafficked migrants (Huysmans and Squire 2010: 171). Although different from the prioritisation of national security, the human security approach views the migrant as a disempowered victim rather than as a political subject and does not question the national framework of security operations (Ibid: 172).

[t]he form of governmentality of postmodern societies is not a panopticon in which global surveillance is placed upon the shoulders of everybody, but a form of ban-opticon in which the technologies of surveillance sort out who need to be under surveillance and who is free of surveillance, because of his profile. ... The emphasis is no longer on curing or promoting individual development but on playing with fears by designating potentially dangerous minorities. Neither reducible to sovereignty and punishment nor to biopolity and power over life, this political technology is based on proactive, anticipative, and morphing techniques and aims at mastering a chaotic future with minimalist management focusing only on risky groups (so-identified) or groups at risk (Ibid: 81-82).

The constitution of migration as a security matter thus points towards a modality of government which governs the population by way of sorting out potentially threatening categories (i.e. migrants) and protecting the rest of the population from such alleged risk. This type of governmentality, which relies and continually constructs notions of collective identity versus a “risky” migrant population, would thus draw on the spectre of potential threats to gain popular support and legitimisation.

Informed by these critical insights, in this work I similarly conceive of the notion of securitisation of migration as a process that is primarily oriented at the management of the population, both local and migrant. I understand it as an exclusionary practice which constructs certain migrants as a potential threat, restricts their movement and is observable over a certain timeframe within legislative measures, policies and official statements. Insofar as a practice, this process is a constant possibility for politico-legal communities, even for those which might not be

securitising migration for the time being. Chapter II will further substantiate the notion of securitisation of migration by looking at the current EU context as both a relative trajectory of legal and policy frameworks over a certain period and a specific mode of migration management which entails the use of specific practices such as detention, biometric databases, border agencies and other technologies. The definition of the reverse trend of de-securitisation is derived from this same explanation. The latter will be substantiated in Chapter III when considering policy frameworks regulating mobility in China, where I will observe the shift from a situation where unplanned movement equalled to treason to the socialist state, to one where free movement is mainly viewed as an economic opportunity for the state.

Having provided a working definition of borders and their securitisation, this work's focus on policy and legal frameworks requires a further clarification of how to conceive of the relationship between borders, law and governmentality.

### *5. Securitisation of migration, law and governmentality*

Legal and criminology scholars have documented the emergence of a securitisation of migration in the terms of a criminalisation of the latter, as the employment of criminal law to sanction immigration violations as well as the addition of immigration law penalties to criminal convictions. This connection, which has also been described as a “crimmigration” (Stumpf 2006) has been investigated in the EU context by several studies (Aliverti 2012, Zedner 2013, Guild 2009, Mitsilegas 2015, Parkin 2013). Parkin distinguishes three dimensions of criminalisation of migration: first, as discourse, second, as an increased use of substantive criminal law to control and punish migration law violations and third, as the legal institution of immigrant detention (Parkin 2013). Mitsilegas similarly looks at the use of substantive criminal law in migration management and

the practice of immigrant detention and further includes in the criminalisation of migration mechanisms of prevention and pre-emption before migrants reach the EU borders (Mitsilegas 2015: 2). On the one hand, these notions of criminalisation of migration are broad enough to include security practices such as preventive operations at the EU border. On the other hand, the criminalisation of migration within law could itself be considered an instance of a broader trend of securitisation of migration. Conceived in such a way, the notion of securitisation of migration is in fact undistinguishable from the notion of criminalisation of migration (Squire 2015: 27). In a similar vein, this work shall use the expressions “securitisation” and “criminalisation” of migration interchangeably.<sup>29</sup>

Enacted to a significant extent through legal frameworks, the criminalisation of migration puts irregular migrants in an ambiguous status. On the one hand, the irregular migrant is hyper visible in the media precisely due to her criminalisation, assumed to be a dangerous subject to be monitored. On the other hand, she is invisible because her lack of institutional recognition impedes the conceptualisation of her juridical and social status as a subject of rights within liberal democracies (Brighenti 2009: 95-6). It is important to note that although ostensibly a matter of security or nationality, irregular migration is a product of law. As a matter of fact, definitions of illegal or irregular migration are defined “against the benchmark of migration law”: an individual who infringes the law is attributed to an illegal or irregular status (Kubal 2013: 555; Dauvergne 2008: 12, Amaya-Castro 2011: 143-144). Not only the content

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<sup>29</sup> Squire has proposed to employ the notion of “irregularisation” of migration to join the two under the same umbrella (Squire 2009, 2011). Although quite suitable for the European context, I do not adopt the notion of “irregularisation of migration” as it does not quite fit the Chinese context, where processes of securitisation and criminalisation of migration do not immediately translate in the “irregularisation” of certain categories of mobility and more generally the perception of irregular status is different from the EU context.

of who is legal and who is illegal is variously determined by legislation which shifts across time but also, the repercussion of irregular status it is determined by its implementation. In the absence of implementation efforts, the illegal condition “is no more than the proverbial tree falling silently in the forest”: as a result, the very phenomenon of illegal migration would be considerably reduced by halting efforts to implement existing laws (Dauvergne 2008: 15). The uneven implementation of the *hukou* system in the Chinese case will be a powerful example in this respect.

Even if different migration regimes are characterised by different degrees of legal enforcement, they all subsume a category of people who are not entitled to be on the territory and are hence “illegal”: in this sense Amaya-Castro has described migration regimes as “illegality regimes” (Amaya-Castro 2011). Illegality regimes across the globe are characterised by different degrees of enforcement which depend on resources availability and governmental scopes in the management of migration (Ibid: 142). Crucially, illegality regimes do not simply affect irregular migrants but also regular migrants, asylum seekers, and even citizens themselves: for example, in attempt to verify the legal status of the population, a state may infringe upon some rights of its citizens, such as the right to privacy (Ibid: 159). As a result, illegality regimes and citizenship are deeply co-implicated. As mentioned above through the concept of civic stratification by Morris, rights - their delivery, their partial granting or denial - are powerful tools of governance of both migrant and local populations.

This Foucauldian-inspired interpretation of rights requires at this point the clarification of a thorny issue: namely, the ambiguity of the role of law within Foucault’s writings. In his discussion of governmentality, Foucault often sets his analysis of modern power against what he defines as a sovereign, juridical conception of it: associated with a pre-modern

notion of power conceived as prohibiting and negative. As a result, the prevailing approach is to conceive of law in Foucault as “a pre-modern harbinger of absolutism” or alternatively, as a tool at governmental power’s disposal (Hunt and Wickham 1994: 59). Yet, as a number of scholars have observed from different perspectives, while some Foucauldian passages appear to confirm this view, others present law as vitally co-implicated with disciplinary and governmental strategies (Ewald 1991, Golder and Fitzpatrick 2009, Martire 2012).<sup>30</sup> In this work, I will maintain the ambiguity embraced by this second position in the literature.

#### 6. *Migration legal frameworks: a spectrum of governmentality*

This work’s close look at the management of migrant populations will confirm the idea that law can be both a tool at government’s disposal, a prohibitive power but also, a positive power enabling individuals through rights. Legal categories are key enablers of the division of the population between nationals and non-nationals, migrants and citizens, desirable migrants and undesirable migrants on which politico-legal units are organised. These categorisations should be seen along what I see as a spectrum of governmentality of migrant populations which can range from the acquisition of citizenship to practices of detention or deportation for the crime or irregular entry or stay. Detention measures for irregular migrants are indeed exemplary of what Foucault understood as a more traditional type of power: sovereignty. Practices such as detention are often characterised by repressive and at times all-encompassing sovereign acts which suggest that sovereign power – as a repressive and punishing mechanism opposed to bio-power – has not actually been expelled from modernity as an orthodox reading of

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<sup>30</sup> A representative case supporting this co-implication is lecture two of the Birth of Biopolitics, in which Foucault observes that while with the old government of *raison d’État*, the legal system simply opposed government’s attempts to be unrestricted, within modernity the relationship between law and government becomes characterised by a law which endorses government’s self-limitation and allows the unrestricted flowing of the market (Foucault 2008: 37-38).

Foucault's notion of governmentality would have it.<sup>31</sup> More accurately, in the management of migration I see sovereignty as currently permeated - rather than rejected or superseded - by biopolitics. This permeation has possibly expanded governmental power over life, as Agamben has notably remarked (Agamben 1998).

According to Agamben, what Foucault labelled a pre-modern, repressive type of sovereignty manifests within advanced liberal societies in terms of a negative biopolitics: as a deprivation and nullification of human rights as well as of life and the body.<sup>32</sup> According to this view, politico-legal sovereignty manifests itself as a constant capacity for political power to expose populations to their bare life:<sup>33</sup> such exposure is for Agamben the hidden "originary political element" of contemporary politico-legal systems (Agamben 1998: 88). Following this account, although apparently excluded from Western politics, the authority to reduce a subject to bare life crucially constitutes a fundamental attribute of sovereign power within modernity, where the distinction between the exercise of sovereign power in exceptional circumstances and the exercise in times of normality is increasingly blurred (Ibid: 122). While an historical instance of such type of biopolitics would be the institution of concentration camps by totalitarian regimes in the twentieth century (Ibid: 119), this perspective is connected to Agamben's witnessing the

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<sup>31</sup> Foucault himself in various passages clarifies that the governmental viewpoint does not entail that sovereignty would be completely ejected from the biopolitical analysis. As he claims in one passage "one of the greatest transformations that the political right underwent in the nineteenth century was precisely that, I wouldn't say exactly that sovereignty's old right - to take life or let live - was replaced, but it came to be complemented by a new right which does not erase the old right but which does penetrate it, permeate it" (Foucault 2003: 241).

<sup>32</sup> A key instance of this type of biopolitics would be the institution of concentration camps by totalitarian regimes in the twentieth century (Agamben 1998: 119).

<sup>33</sup> Agamben's concept of bare life is defined as a "simple, natural life" as opposed to a conception of human existence conceived as "private life and political existence" (Agamben 1998:187). Despite appearing to be set outside of the field of the political, bare life is politicised "through abandonment to an unconditional power of death" which sovereign power might exercise over its subjects (Ibid:88).

emergence of irregular migrants' detention centres in Italy.<sup>34</sup> Several migration studies - often focusing on refugees and asylum seekers - have drawn on these remarks in their analyses of the government of migration in present-day Western liberal democracies (De Genova 2002 and 2010, Rajaram and Grundy-Warr 2004, Zartaloudis 2013).<sup>35</sup>

While the detainable condition of irregular migrants at times resulting in the condition of bare life represents an extreme depiction of the consequences of biopolitics, given the activities and techniques migration-receiving states increasingly dedicate to assist irregular migrants in maintaining their physical existence, the condition of detained migrants has been further described as a "minimalist biopolitics" (defined by Redfield and then refined by Walters) (Redfield quoted in Walters 2011: 144). Instead of merely reducing its subjects to bare life, detained migrants would more specifically be submitted to a lesser treatment compared to that reserved to the national population: while the latter's health is to be nourished and increased, the former's wellbeing is only to be maintained at a survival minimum (Ibid). This problematic link between politics of exclusion and care has been conceptualised through the notion of a "humanitarian border", to indicate how contemporary borders are increasingly carved through discourses of securitisation but also, through the rhetoric of humanitarian assistance (Ibid: 146).<sup>36</sup> In the

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<sup>34</sup> In a 1997 article, Agamben condemned the death of a hundred Albanian boat migrants who drowned in Otranto channel while trying to reach Italian shores (Agamben 1997). Again, in a 1998 interview for the Italian newspaper "Il Manifesto", Agamben compared the emergence of migrants' detention centres to Nazi lagers, where sovereign power discloses its regulation of bare life and hence its biopolitical reach. See Agamben, G. and Caccia, B. "Nei Campi Dei Senza Nome." in: *Il Manifesto*, 3 November 1998.

<sup>35</sup> For example, for De Genova the phenomenon of detention for irregular migrants enacts a regime within which the mere possibility of being deported ("deportability") rather than deportation per se transforms undocumented migrant labour into a "disposable commodity" (De Genova 2002: 438).

<sup>36</sup> The humanitarian border will be considered in the case of the EU's external borders. This type of border is of course contextual to the governance of specific zones delineating migration from the global South to developed countries (Walters 2011: 146). However, it will be seen that the same



EU context, scholars have further illustrated how humanitarian concerns in migration management have evolved into a central device of government of the migrant population through notions of compassion (Fassin 2005 and 2012, Cuttitta 2014, 2015, 2017).

The connection between security and migration is further characterised by two opposed approaches towards the role of legal frameworks within the literature. On the one hand, some see the securitisation of migration as a process that entails states advocating exceptional extra-legal measures, on the other hand, some view in the hidden advancement of ordinary laws and technocratic measures the main channel for the securitisation of migration (Campesi 2012). According to the first approach, borders are an exceptional, a-legal zone which is excluded from the ordinary juridical-political territory of the state, despite being “an integral part of that juridical-political territory”, ensuring its demarcation and integrity (Vaughan Williams 2009: 73). Drawing on the Agambenian notions mentioned earlier, according to this first approach borders would be the spaces of exception upon which the political order is based and would be characterised by fuzziness between norm and exception, exemplified by practices such as detention camps.<sup>37</sup> According to the second approach, which could be traced back to Foucault as its theoretical source, the securitisation of migration has taken place through ordinary laws and practices (Campesi 2012: 16-17). The prevention of migration would have become a permanent condition that is implemented through ordinary legislation and securitisation and is silently advancing as risk management (Bigo 2002, Huysmans 2006, Van Munster 2009), or through illiberal practices at border zones which are

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differentially distributive mechanism presides over the distinction between local urban residents and migrant residents characterising China's internal borders.

<sup>37</sup> Similarly referring to the Agambenian framework, Sapio considers China's practice of detaining internal migrants (a measure which was repealed in 2003) among the instances of administrative detention stemming from law in China (Sapio 2010).

entrenched in ordinary measures implemented by liberal democracies (Basaran 2008).

In line with the analysis proposed by Campesi, in this work I consider these two approaches as complementary rather than opposed. On the one hand, the way in which borders have been securitised over the last decades in the EU is not the consequence of a radical political rupture or the proclamation of a state of emergency (Campesi 2012:19). Nevertheless, the securitisation of EU borders has been speeded up by a series of political events or “crises”, such as the push given to it by the EU enlargements in Eastern Europe or the movements triggered by the Arab uprisings (Ibid).<sup>38</sup> It is important to remark that even in exceptional times, the main scope of migration regimes is not simply to impede migration but to “immunize the internal space through the filtering of positive and negative circulation” (Ibid, my translation). As a matter of fact, practices such as the deportation and detention of irregular migrants - which have currently become standard procedures of migration management in the global North - fuel a “border spectacle” where draconian measures of border policing stage an exclusion that disguises the actual inclusion of irregular migrants within receiving states’ labour markets (De Genova 2002, 2012, 2013). The intersection between the construction of borders, migration management and market economy is a key tenet of this work’s theoretical framework and shall be briefly discussed in the next section.

## *7. The economic dimension of migration law in a neoliberal era*

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<sup>38</sup>A further distinction can be made between the EU and national level: while the emergency logic in the management of migration often characterises national politics - where the political dividends of security crises can be cashed in on by governments - at the EU Level the reaction is often technocratic, inviting governments to make use of the EU system of containing risks (Campesi 2012:23-24).

As just posited, security discourses around migration normally elide how irregular migration translates into “cheap and easily exploitable manpower” which continually enables “the carrying out of some desirable short-term economic objectives, such as the decrease in production costs, the survival or even the growth of many enterprises and the rise in exports” (Tsoukala 2005: 162). One of the main assumptions underpinning this work’s comparative overview is that regardless the reasons why individuals migrate, human mobility has an economic dimension insofar as destination countries or localities “are concerned with the role of migrants in meeting demand for labour and skills” (Castles et al. 2014: 240). This assumption draws to some extent on historical-structural theories of migration, according to which the control and exploitation of labour by states and corporations is fundamental for the capitalist system of market economy to survive: in such context, migration is one of the main indicators of capitalist infiltration (Massey et al 1998: 34-41). Migration phenomena would represent an unlimited source of lower priced and a more submissive workforce to fill the gaps of local labour markets. While traditionally this function is attributed to low-skilled migration, high skilled migrant labour is also key to satisfy the structural demand to perform production tasks in capitalist economies (Castles et al. 2014: 35). In this framework, restrictive migration policies, public racism, xenophobia and so on would not only perform a politico-symbolic function but would serve to “facilitate and legitimize the exploitation of migrants on the labour market by depriving them of their basic rights” (Ibid: 36).<sup>39</sup>

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<sup>39</sup> Marxist theories view states, multinationals and employment agencies as the main causes and determinants of migratory movements: the structural demand for high and low skilled labour to fuel capitalist economies would be the main driver of migration. have the advantage of foregrounding the connection between migration management and receiving states’ labour markets. Yet, the centrality they attribute to the economic sphere ends up depicting the phenomenon of migration as a mere consequence of the economic superstructure and this centrality “rules out human agency” (Castles et al. 2014: 36).

Somewhat differently from the reading above, in this work I conceive of market economy as an important dimension of migration management rather than the only driver or determinant of the choice to migrate and migration control. While individuals migrate for a variety of reasons which may not have to do with economic determinants, I hold that nonetheless the choice to move always has an economic dimension. The idea being that the demand for both low and high skilled migrant labour is a structural feature of neoliberal economies (Ibid: 253). This feature crucially intersects with legal categorisations of migration. While those held culpable of irregular entry or stay are the most visibly vulnerable, regular migrant statuses (i.e. student, tourist, work-permit holder and so on) also engender different degrees of rights and restrictions, as seen earlier through the notion of civic stratification. The intersection between migration legal frameworks and labour markets gives rise to a spectrum of migrant statuses that involves differentiated employment and social rights (Zou 2015: 43). To highlight this dynamic, Zou has suggestively described immigration laws as labour market regulation (Ibid). The enduring and shifting impact of non-citizen status on employment and social rights has been further captured through the notion of “precarious legal status”, a notion which encompasses both regular and irregular migrant statuses (Goldring et al. 2009: 245).<sup>40</sup> While this analysis primarily refers to migrants, the concept of precarious labour status can be seen in tandem with a neoliberal tendency “to make citizens increasingly individually responsible for their existence”, and part of a broader process to curb the welfare state and social citizenship as a whole in advanced economies (Ibid).

The construction and reproduction of borders which will be examined in this work is more specifically situated in a context of neoliberal market

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<sup>40</sup> An example for this are Temporary Migrant Workers programmes, making regular status dependent upon employment. For an analysis of temporary migrant status and labour work relations see Zou (2015, 2016).

economy. In the European context, Foucault has theorised neoliberalism at the end of the 1970s as an emergent notion of good government which assumes that economic and social progress is endangered by too much intervention by governments (Foucault 2008: 27-47). This notion further models the general exercise of political power according to the principles regulating market economy, which are “projected on to a general art of government” (Ibid: 132). Differently from liberalism,<sup>41</sup> neoliberalism would be rooted in the discovery that neither the market nor individual economic behaviours are natural: in order to exist and produce results, the market economy system requires government intervention and the guarantee of certain conditions (Ibid: 2008:120). The same would apply to the idea that both competition and the economic benefits generated from it are natural (Ibid). The enforcement of legal measures is key in securing and maintaining the conditions for the existence of the market and enable ‘free’ competition.<sup>42</sup> Nevertheless, as Brown has remarked, legal provisions and political decisions intervening to guarantee the conditions of the market do not entail the control of the state over the market (Brown 2009: 41). As a political rationality, the market rather becomes “the organising and regulative principle of the state and society”, promoting a depiction of the individual as a homo *oeconomicus*

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<sup>41</sup> For Foucault, neoliberalism is an evolved version of liberalism. The latter is to be understood as both an abstract recognition of the principle that government must be limited and a practice of individuating the principle of the limitation of government and calculating the effects of this limitation (Foucault 2008: 20, unnumbered footnote by editor). Within such view, liberalism is to be conceived as a political rationality characterised by the fact that “there is no economic sovereign” and hence the presumption of political neutrality (Ibid: 283).

<sup>42</sup> Perhaps the best illustration for this, as shall be seen in Chapter III, is China’s transition to a market economy, which has been heavily dependent on the reconstruction of a legal system to guarantee the conditions for the market to develop.

which should provide for her own needs and care for herself (Ibid: 40-41).<sup>43</sup>

Consequently, the neoliberal political rationality ends up becoming productive of political legitimization. In contrast with traditional renditions of the state as legitimised by an ideal constitutional pact with its people, economic performances and continuous growth would become the main grounds for state's legitimacy (Lemke 2001: 196). As Brown puts it:

... the health and growth of the economy is *the* basis of state legitimacy both because the state is forthrightly responsible for the health of the economy and because of the economic rationality to which state practices have been submitted. Thus, "It's the economy, stupid" becomes more than a campaign principle; rather, it expresses the legitimacy principle of the state and the basis for state action — from Constitutional adjudication and campaign finance reform to welfare policy to foreign policy, including warfare and the organization of "homeland security" (Brown 2009: 42, original emphasis).

While this quotation refers to the North American context, I would like to suggest that the same critique of governmental rationality applies to both the European context (where Foucault first formulated it) and to contemporary China (Dutton and Hindess 2016).

As Dutton and Hindess have exposed, the notion of neoliberal governmentality is apt to understand China's current context due to a useful historical coincidence (Ibid: Kindle Locations 790-791). More specifically,

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<sup>43</sup> One of the few hasty allusions Foucault makes to migration precisely relates to his application of the neoliberal perspective to the phenomenon of migration by equalling migration to an investment, and the migrant to an investor (Foucault 2008: 130).

the neoliberal context currently characterising both the EU and China would stem from two concurrent yet different crises of Marxism: in the European context, the notion of neoliberal governmentality picked up notably through Foucault's works in the late 1970s as a theoretical critique of Marxist theories of the State (Ibid). In China, accidentally at around the same time, governmentality was experimented with in practice as the country's Marxist-inspired system embarked on a path of radical economic reforms (Ibid: Kindle Locations 308-315). In Europe, Foucault has theorised neoliberalism as an emergent notion of good government "as the least possible intervening government, dissolving political power away from the State into countless regimes of care" (Ibid: Kindle Locations 725-726). In China, the practice of neoliberalism has instead germinated from the prevailing notion of "frugal government" characterising China during Maoism, consisting of "a mass-line mode of government that used constant mobilisation of the population to achieve national progress while employing the least possible material resources" (Ibid: Kindle Locations 740).<sup>44</sup> With the introduction of economic reforms, such principle progressively moved from being a "moral pillar" to becoming an "abstraction" translated in a practice of pursuing efficiency (Ibid: Kindle Locations 742-745).<sup>45</sup> As will be showed later on in this work, the delivery of economic results and continuous economic growth have arguably become the main basis of legitimation for China's ruling party.

This section's discussion of the economic dimension of migration management and neoliberalism in different contexts triggers the consideration that all the notions discussed so far – from the definition of

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<sup>44</sup> Within such context, frugality – translated as an individual and collective pursuit of self-reliance – was a moral tenet of a political agenda aimed at enabling the party state to be one with its people "in thought and deed" (Ibid).

<sup>45</sup> As will be considered more in detail later in this thesis, before the era of economic reforms in China notions of development or social transformation were driven by "political intensity born of sacrifice and passionate commitment" (Dutton 2005: 163). The transition to market economy transformed instead politics and the state into "a rational, protective shell surrounding an economic machine driven by market-based incentives" (Ibid).

borders to that of securitisation of migration - are in fact mainly based on evidence from the European context. The methodological problems of approaching the Chinese context with Western-based definitions directly brings us to matters of the methodology of this work and its challenges. The next section seeks to explain why a comparative legal perspective can be beneficial to current understandings of borders in the EU context, followed by the why of the specific comparative selection and the how of such comparative task.

## PART II. THE COMPARATIVE PERSPECTIVE

### 8. *Why compare?*

Having put forward the working definitions of the notions of borders and securitisation of migration adopted in this thesis, this section shall proceed to a discussion of comparative law as its method. This section discusses approaches and aims of comparative legal perspectives and posits that comparative perspectives can reveal insights which would not be visible when analysing a single context.

A rich diversity of comparative purposes exists within comparative law scholarship. By and large, the purpose of comparative law as a discipline has also substantially changed over time. For example, at the outset of the discipline, conventionally dating back to the second half of 18th century, the main scope of the comparative eye was to observe the general nature and development of legislation and to compile the advancement of a universal legal history. Later on, the object and purposes of the discipline evolved to pursue issues such as: principles and legal methods that distinguish various legal families, the study of ideal types of legal systems, harmonisation of laws, legal transplants, legal change and so on (Stramignoni 2002:8-11). While at its origins



comparative law was mostly preoccupied with legal rules per se (the so called “formalist” approach), it progressively shifted to a “relational” method, promoting the consideration of different legal realms and not only legal texts (Ibid: 11). Gradually, the principle that different things can be compared as long as they fulfil the same legal function was embraced. The so-called “functionalist approach” has been described as the most influential approach within the comparative law discipline to the present time (Frankenberg 1985: 428–29; Legrand 2005:632; Ruskola 2002:187).<sup>46</sup> The principle, as defined by Zweigert and Kötz, states that

[t]he basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function ... . The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results (Zweigert and Kötz 1998:34, original emphasis).

Functionalist approaches maintain that in order for two things to be comparable, they need to be fulfilling the same function. Assuming that societies experience the same problems but employ diverse legal solutions to them, the functionalist method would enable scholars to compare things in order to seek “better solutions” (Ibid: 15). In doing so, functionalism would be able to deliver legal policy recommendations and

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<sup>46</sup> On the contrary, according to Graziadei despite being one of the most notorious working tools over the past century, functionalism was never the only approach in comparative scholarship (Graziadei 2003:100).

provide a wider choice of solutions than those offered by legal studies dealing with one legal system, broader than the range which “could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system” (Ibid).

Zweigert and Kötz’s approach has been subject to a number of criticisms.<sup>47</sup> For example, for Legrand the functionalist approach problematically overlooks the epistemological conditions under which the achievement of legal knowledge takes place; by doing so, this approach would hinder the accomplishment of any useful knowledge (Legrand 2005: 655). Legrand moves instead from a notion of comparative legal research as mediation between different forms of legal context: “comparison must involve the primary and fundamental investigation of difference” (Legrand 1997: 23-24). According to such account, when approaching different contexts, comparatists cannot but see them through the lenses of their own understanding and experience of what is law.

Most reasonably, comparative legal studies is about law. But who undertakes comparative work equipped with a theory of law? Who has a sense where the law begins and where it ends? Who has reflected upon what counts as law and what counts as non-law? Where is the boundary to be drawn between the normal and the deviant, the normal and the pathological? For most ‘comparatists’, the matter is easily resolved. ... In short, the law is to be found in legislative

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<sup>47</sup> Critiques of mainstream comparative scholarship have sometimes associated themselves with the movement of Critical Legal Studies. There is no agreement over whether the wave of so called Critical Comparative Legal Studies transcends mainstream Comparative Law or rather belongs to the same collective effort (Mattei 2008). For this author, the debate is ultimately a personal matter of preferring the label of mainstream comparativist over that of critical comparativist. A more substantial problem is mainstream comparative approaches’ attitude of ignoring the epistemological conditions under which comparisons take place. Such indifference is also reflected in the unimportance accorded to Asian legal systems within world’s comparative taxonomies, as will be seen below.

texts and judicial decisions. And, it is that which 'comparatists' emphatically study. However, their conviction is not the outcome of deep reflection on the ontology of law. Rather, it is the mere extension of what these 'comparatists' were taught about the meaning of law, often by teachers who themselves were not comparatist or theoreticians but were simple technicians of the national law (Legrand 1996:235).

For comparative law compares law as it is inscribed within different cultural traditions, the act of comparing would always be characterised by a (more or less conscious) act of determining law against some content. Consequently, in comparing two situations where law differs, comparative law is potentially in a good place to illustrate the "alterity-in-the-law" characterising all law (Legrand 2005: 707). In other words, comparatists would be in a privileged position to deconstruct their object of investigation and to create a possibility for "cross-legal/cross-cultural/cross-traditional mediation" (Ibid: 710). Accordingly, for Legrand not only comparative legal studies can most aptly be seen as deconstruction but also, deconstruction can in fact "be better understood in the light of comparative legal studies" (Ibid 2005: 717).<sup>48</sup> While such insights are crucial to this work and wink at a far-reaching comparative realm, Legrand himself does not address the non-European dimension of comparative law in actual comparisons (Menski 2000:16).

Legrand's criticisms of the functionalist approach echo Frankenberg's accusation of the "legocentrism" characterising mainstream comparative legal studies, which would be treating law

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<sup>48</sup>Legrand draws on a Derridean notion of deconstruction which posits that "[d]econstruction is about an encounter with something, with something else in a way which, on every occasion, intimates an assumption of responsibility to the reader who must answer for his interpretation" (Legrand 2005: 692).

... as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony ... Lego-centric thinking and legalism, its political strategy, draw their strength from an idealized and formalized vision of law as a set of institutions, rules and techniques that function to guarantee and, in every possible conflict, to vindicate individuals' rights. If legal provisions do not live up to the promises inherent in the rule of law, this may be interpreted as an unfortunate and atypical accident, a singular event of justice miscarried. Thus, the overall legitimacy and efficiency of the legal order remain intact (Frankenberg 1985: 445).

Legocentrism - which Frankenberg attributes to mainstream comparative legal studies - would not just prevent from a deeper understanding of geographically different contexts. Within comparisons between Western and non-Western perspectives,<sup>49</sup> the mainstream attitude often translates into a discursive colonisation of other cultural contexts, enduring a legal mind-set which affirms Euro-American cultural superiority over the legal traditions of the rest of the world (Baxi 2003:49).

This thesis acknowledges the shortcomings of the functionalist approach and adopts as a result a cautious notion of functionalism which will be specified later in this chapter. This notion does not give too much attention to the institutions but rather to the function of the legislation and policies in question: namely, the function of controlling mobility and dividing the population. The thesis assumes that the (political, legal,

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<sup>49</sup> This work's definition of West is an identity in no way definitive or complete: as will be explored later on in the case of legal Orientalism, countless versions of West and Orient exist. As the case of Chinese law from a Western perspective will make evident, the definition of each of these two identities relies on each other.

cultural and economic) dissimilarities between China and the EU are not an obstacle to comparison. Quite the contrary, I maintain that comparative dissimilarities allow for the revelation of insights which would not appear in the pursuit of traditionally safe comparisons, such as those of Euro-American countries (Frankenberg 1985, p.452-453).<sup>50</sup> As Örücü has reasonably noted

[i]t is not only similarities but often differences that help us to develop theories. Comparative law thrives on differences. It is a fact that comparisons complicate rather than facilitate research; yet this enhances the quality of research. Therefore, scholarly comparative law research, by increasing detailed understanding of legal phenomena will point in the direction of diverse systems: the more diverse the systems, the more rewarding the findings (Örücü 2004: 34).

Comforted by the promise of rewarding findings, one of the assumptions of this work is that the political, legal, cultural and economic dissimilarities between China and EU do not represent an obstacle to the comparison. Quite to the contrary, they expose to prospects which would not appear possible when pursuing traditionally secure comparisons, such as those among Euro-American countries. My assumption is that not only are these two migration regimes comparable, but also that a comparison with China's migration regime can valuably elucidate aspects of the EU migration regime which are not visible when comparing the latter with more similar systems, such as the US migration regime. The next section articulates few specific reasons for why China is a good fit for a comparative perspective on borders in the European Union.

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<sup>50</sup> Interestingly, Frankenberg mentions China as an example of a profitable term of comparison with Euro-American contexts (Ibid: 243).

### 9. *Why a comparison with China?*

While an extensive amount of socio-legal work exists on migration in the EU and in China respectively, as already mentioned in the introduction to this work, very few socio-legal studies in the English language have attempted a comparison between the two. The rareness of comparisons between these two migration regimes can perhaps be attributed to the fact that China is a nation state and the EU a supranational organisation, thus a group of states. Given the seemingly different nature of the two politico-legal units in question, the comparison between the two would be inappropriate. Earlier in this chapter, I nevertheless rebutted notions of borders as fixed and natural national entities. In their place, I put forward a definition of borders as processes which consist of shifting conglomerates of laws, policies and measures which operate as obstacles, impediments or incentives to mobility across politico-legal spaces. This definition of borders conceives of migration laws and policies as constitutive of borders rather than a second order effect of a world where mobility is restricted in the name of a world “naturally” divided into nation states. As a result, the legislation and policies operating as obstacles to mobility in the EU and in China are comparable because they fulfil the same function of controlling the mobility of migrant populations.<sup>51</sup>

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<sup>51</sup> Differently from mainstream functionalist approaches, my approach is nevertheless careful not to assume that migration management within these two politico-legal systems shares the same problems and that they necessarily solve them through law. As will be seen in Chapter Three, this is particularly true in the Chinese context, where laws are considered as consolidations of successful policies, which are prioritised over law. Given that comparative law methodologies primarily compare corresponding areas of law, another objection related to the previous one is the type of legislation and policies that will be reviewed in this work. The multi-level analysis of borders in this thesis will make necessary a consideration of immigration legislation in the EU and China together with administrative laws and policies establishing China's internal borders. Again, the idea is that the function of regulating populations and their mobility characterises both national borders and the administrative borders instituted within some nation states.

Although as mentioned earlier comparisons between the EU and China are extremely rare, the possibility of comparing China's internal borders with international borders has nonetheless been raised in passing by a number of Chinese scholars. Xiang has observed for instance that from the perspective of Chinese migrants, the obstacles to migration among regions in China are not dissimilar from those inhibiting freedom of movement at the international level (Xiang 2005: XIII). Others have directly equalled China's household registration system to national immigration systems (Wang 2005, Zhao 2003). By way of an explanation, China's severe economic disparities between cities and countryside would resemble the world in a smaller scale, whereby Chinese cities correspond to rich developed countries and China's countryside would equate to that of developing countries. Defending the existence of China's internal borders, some have gone as far as to say that "*hukou* is everywhere": despite not being seen in the same "benign" light of international borders, internal borders in China would have the exact same nature (Zhao 2003: 18).

As anticipated in the introduction, a key case in favour of a comparison with China is its sheer number of internal migrants, which alone is seven times larger than (EU and non-EU) migrant population in the Union and exceeds the total of the whole world's international migration. Numbers speak for themselves and make China's migration regime a fascinating case study for the unusual size of migrant population compared to any other context in the world. Moreover, the idea is that the consideration of the Chinese context and its management of such huge numbers can offer lessons and cautionary tales in migration management, especially on the issue of how to cope with growing numbers of migration in the EU.

The second reason for selecting China as a term of comparison with the EU is that, as already posited, China's overall trend of de-

securitisation of internal and international migration over the last decades runs opposite to the increasing securitisation of non-EU migration in the European context. As a result, the consideration of the Chinese context may offer an alternative response to the present conventional wisdom in the European context, framing non-EU migration as a security matter and holding that increasing numbers of migrants necessarily call for more security measures.

Thirdly, the consideration of China's internal and external borders widens the scope of comparative studies with the EU migration regime. As migration studies typically focus on evidence from the European or American contexts and the investigation of South to North migration, the question of the production and policing of borders in the rest of the world is relatively underrepresented in migration studies. In this sense, the exploration of the Chinese context can enrich the evidence and current understandings of the global governmentality of borders. Moreover, the selection of China further moves beyond the focus on South to North migration and includes in the picture North to South migration as well as South to South migration – whose numbers are again underrepresented in studies of migration, disproportionally focused on South to North migration.<sup>52</sup>

While contemporary migration scholarship conventionally takes the nation state as the basis of distinctions between internal and international migration, legal and illegal migration and so on (De Haas 2009: 19), remarkably, one of the first systematic studies on migration did not distinguish between internal and international migration, explaining them as one phenomenon mainly caused by unevenly distributed economic

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<sup>52</sup> This is so despite the fact that according to IOM statistics, the actual size of South to South migration has recently surpassed in size South-to-North migration <https://www.iom.int/news/iom-releases-global-migration-trends-2015-factsheet> Accessed 5 September 2017



resources (Ravenstein 1889).<sup>53</sup> A fourth reason for this comparison is that by looking at internal borders, this comparative selection of China further allows the investigation of borders beyond the yoke of methodological nationalism (Wimmer and Schiller 2002).<sup>54</sup> The comparative selection with China allows us to go beyond national determinations of borders and focus instead on how different politico-legal units organise themselves around location-based divisions of the population. The comparative outlook on national borders (despite their supranational import) in the European case and administrative borders in China will uniquely enable a juxtaposition of “natural” national borders with “unnatural” administrative borders. In doing so, the comparative selection offers a fresh perspective on borders from a conceptual viewpoint: for China’s internal borders are not obscured by the ideological aura surrounding and grounding borders in the European Union.<sup>55</sup>

Finally, this comparative selection enables us to see the management of migration and its connection with security within two different politico-legal types of government: in the EU case, a union of liberal-democratic states and in the Chinese case, an authoritarian state. By considering the management of migration within these two contexts, this work’s comparison further sheds light on migration management and its connection with the issue of security beyond the different facades political-legal systems may show.

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<sup>53</sup> German–English geographer Ravenstein posited that migration always concerned mobility from poorer to richer areas (Ravenstein 1889).

<sup>54</sup> *Supra*, footnote 9.

<sup>55</sup> Borders in the EU may have been erased internally and drawn together as supranational borders externally but remain conceived as national at heart. On the contrary, the legislation and practices associated with China’s internal borders are not vitiated by the idea of “being geographically there” as in the European case.

Having enunciated the main reasons why China is a good case for comparison, the next section the next section moves on to a discussion of the challenges and the methodology with which this thesis comparison will be undertaken.

#### *10. How to compare?*

As mentioned above, comparisons complicate rather than facilitate research due to the differences between the two terms of comparison. De Cruz has identified a few practical challenges to legal comparisons worth recollecting here (De Cruz 2009). Perhaps the most obvious obstacle is linguistic differences, and the connection between linguistic structures and legal structures (Ibid: 2).<sup>56</sup> In our case, compared to European languages, Chinese is a language where many notions can be left open (i.e. often undefined number of things, undefined singular/plural), the closure of which is often provided by the context to which they refer. Accordingly, when connecting linguistic structures with legal structures, the translation will pay attention to the context. A second complication is the cultural difference between systems: an understanding of Chinese law clearly requires an understanding of the values and attitudes binding the legal system together, determining its position in society (Ibid: 3). I will try to prevent the risk of misreading cultural differences between the two systems through an introductory section on the main characteristics of the Chinese legal system in Chapter III. Another impediment has to do with the fact that the selection of the objects of study is subjective and dependent on the purpose of the comparison: as a result, there is always a risk that aspects considered for comparison might not be the most apt or

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<sup>56</sup> An oft-quoted example for that is the term “equity” (*Aequitas*, *equite*, *Billigkeit*) which has different meanings in civil law and common law jurisdictions. In continental Europe judges apply the term when they wish to apply a broad interpretation of a legal principle; in English law, “equity” describes the body of law originating from the Courts of Chancery from around the 15th century as opposed to the legal principles being developed by the common law courts (De Cruz 2009: 2).

the only ones suitable for comparison (Ibid). Comparability values are also very much influenced by cultural, political and economic factors. In the specific case of this work, the goal of achieving a better understanding of the current dynamics of borders in the EU is only one possible path, not necessarily the best.<sup>57</sup> Another danger which this work will not escape is the researcher's desire to see a general pattern of development in legal systems and, related to the previous point, the tendency to impose her own conceptions and expectations about the legal system (Ibid: 4). Finally, there always exist dangers of keeping out some extra-legal rules or overlooking extra-legal factors which influence the state of the law (Ibid). These two last difficulties are particularly insidious when dealing with Chinese law from a Western perspective. As will be seen shortly, disregarding them can easily turn into a discursive colonisation of cultural contexts different from one's own.

Legal comparisons with the Chinese legal context are furthermore challenging because of the more general status that Chinese law is normally accorded within comparative law taxonomies. A survey among the most popular comparative law taxonomies<sup>58</sup> by Peerenboom remarks how China

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<sup>57</sup>I experienced this criticism in particular on one occasion, when presenting my research to a Chinese-only audience during my fieldwork in Beijing. My presentation raised a lot of perplexities for its lack of specific practical suggestions for policy or legal reform. As a counterargument, one could claim (as I did) that legitimising academic research only on the basis of what is immediately useful for policies and legal reform can be reductive and endanger the achievement of a more comprehensive knowledge on borders and migration.

<sup>58</sup>Peerenboom surveys some popular comparative legal taxonomies. First is David's one, which distinguishes between common law, civil law, socialist law and a category defined as "other", which includes Muslim, Hindu and Jewish law, African and that of the Far East. China's legal system is included in the Far East category and described as a system where law "is an instrument of arbitrary action rather than the symbol of justice; it is a factor contributing to social disorder rather than to social order" (David 1985 in Peerenboom 2003:40). The second taxonomy considered is that elaborated by Glenn (Glenn 2000), who not too dissimilarly allocates China to an Asian Legal Tradition strongly influenced by Confucianism (Glenn in Peerenboom 2003: 41). The third example thoroughly discussed by Peerenboom is Mattei's tripartite taxonomy of three types of legal systems (on the basis of whether the foundation of social norms and order is law, politics, or philosophical

(together with several other non-Western countries) often stands as an example of despotic customary rule as an antithesis to Euro-American countries, characterised instead by a professionalisation of law, centrality of legal procedures, formality and rationality of their legal systems (Peerenboom 2003: 40-41). Peerenboom reasonably blames these taxonomies of Orientalism as an attitude of representing Western legal systems as culturally superior to others (Ibid: 41). Within such perspective, the disorder, arbitrariness and discretionary despotism associated with non-Western countries would assist the constitution of an image of Western countries as a sanctuary of order, rationality, bureaucratic rigour and predictability (Ibid). Whereas the impact of culture on modern law seems to vanish in the latter's case, the former's legal systems would often be depicted as exceeding in culture (religious beliefs and philosophical traditions); in the Chinese case more specifically, Confucianism and several "Chinese" features are held responsible for the failure to achieve a modern rule of law (Ibid:42).

Yet the damage produced by (the indifference to one's own) epistemological preconceptions goes beyond the risk of summary depictions of non-Western legal systems. Drawing on post-colonial studies, Ruskola proposes a subtler and more profound meaning for the term Orientalism as it has occasionally been brought up within comparative legal studies. His explanation relies on Said's insights on Orientalism, remarking on how knowledge about the Oriental other is a fundamental tool of defining one's own identity (Ruskola 2002, 2013).<sup>59</sup> Said's analysis importantly illustrates

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and religious tradition), which presents China among those systems grounded on philosophical and religious tradition (Mattei 1997 in Peerenboom 2003: 44-95).

<sup>59</sup> Through an analysis of various European literary works and arts, Said powerfully reveals how European culture has created the concept of Orient in various ways: political, sociological, military, ideological, scientific and imaginative. Western culture has a long tradition of depicting Asia, in general, and the Middle East in particular. Orientalism is defined as a discourse that constructs the East, and created the "others", at times as exotic, primitive, traditionalist, violent, lustful etcetera. The Orientals in other words have been standing for what the West was not. These representations of the Orient have helped to establish the West's own identity as such (Said 1978).

how European literary and artistic production in the last few centuries has often depicted the Oriental other as a deviation of Western culture, and accorded it an inferior status. This representation - which has entertained a close relationship with the legitimization of colonial and imperialist ambitions - has been fundamental for the definition of Western identity and is appropriately transferred by Ruskola to the field of legal studies.

Ruskola shows how historically the United States have erected their cultural identity against China from the point of view of law: the depicted lack of Chinese legal subjectivity or/and the supposed Chinese lack of an indigenous tradition of law have fundamentally served to mark the identity of American Law and the constitution of its legal subject (Ruskola 2013). Crucially, such an attitude would have furthermore shaped the field of knowledge in which comparative studies of Chinese law unfold today: narratives of what he describes as “legal Orientalism” are played against Western conceptions of law, by way of asserting what Western law is not.

By the term legal Orientalism ... I refer on the most general level to a set of interlocking narratives about what is and is not law, and who are and are not its proper subjects ... . Of course the West - to use a purposely imprecise term - has many Others, and the Orient is only one of them. At the same time, the Orient itself is a radically determinate category, denoting an entity of the European imagination that extends from Morocco in North Africa to Japan on the eastern edge of Asia ... the cultural world of China represents only one instance of Orientalism (Ruskola 2013: 5).

As Ruskola notices, not only multiple “legal Orientalisms” exist when considering Western representations of Chinese law. The picture is further complicated by the fact that, in turn, Chinese scholars use

representations of Western law for their own purposes, to confirm their own self-understandings of what Chinese law is. This often exists in the form of Chinese “self-Orientalism”, espousing the idea of a Western legal superiority, but also, alternatively, as Chinese “Occidentalism”, as self-definition against the Western Other (Ruskola 2002: 223).<sup>60</sup> Crucially, all these identifications would be instrumental: even when Chinese scholars declare the inferiority of the Chinese legal system in respect to Western ones, such ranking is used as a tool to impact on their social context. In other words, Chinese and Western law are present in both Chinese and Western imaginations and “are inter-subjectively linked”: the knowledge about Western law is instrumental to the formation of the Chinese legal subject and vice versa, knowledge of Chinese Law has helped the creation of the Western legal subject (Ruskola 2002: 197, Ruskola 2013: 36). The notion of legal Orientalism thus stands as a powerful warning of the unavoidable epistemological biases underlying all comparisons, yet it does not entail that comparisons are not possible. As Ruskola observes, the remedy to the fact that “we cannot help essentializing others and even ourselves” cannot be a prescription “not to Orientalise”, as this would in essence invalidate any comparative enterprise (Ruskola 2013: 54). Rather, the only solution appears to be an “ethics of Orientalism” (Ibid), acknowledging that we cannot help but to some extent “Orientalise” – or else, employ our own preconceptions about law when approaching other legal contexts. Rather than invalidating comparisons, this ethics ought to trigger an effort to take into account the ways in which our perspectives limits the agency of the comparative others as subjects and represents them as subjects of agency (Ibid: 55).

Following these remarks, this work is not only oriented by an ethics of Orientalism in its methodology, but such ethics somewhat orients the

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<sup>60</sup> To be sure, since the first contacts between Europe and the middle Kingdom the Chinese have often referred to Western “barbarians” to construct consciousness of Chinese identity (Ruskola 2013: 35-36).

main goal of this work as well. Indeed, the comparative outlook on China is aimed at gaining new critical insights on migration management in the EU (the context where this author writes from) rather than an assessment of the Chinese context. The next section puts forward a few concluding caveats to the methodology of the comparative analysis this work undertakes.

### 11. *Concluding caveats*

A few methodological caveats are still in need of being specified. A first caveat has to do with theoretical foundations of this work, which mainly employs Western theories to examine borders in the two contexts. A prominent instance is my use of Foucault's insights on governmentality and population as a key theoretical orientation of the comparative perspective. In line with what was discussed above, I do not see a problem in employing concepts from different contexts, provided that the origin of the theories is made clear. The notion of governmentality is a particularly apt one to shed light on China's migration system<sup>61</sup> and has been already employed in several China area studies [Dutton 1992, 2005, 2009, Dutton and Hindess 2016, Greenhalgh and Winckler 2005, Bray 2005, Jeffreys and Sigley 2009 (eds), Bray and Jeffreys 2016 (eds)].

On the one hand, socialist China's arts of government resemble those of Western liberal democracies in their concern with managing populations' welfare, security and health; on the other, Maoist China diverged from liberal democracies in the way it dealt with the possibility of knowing the subject it governs (Jeffreys and Sigley 2009: 7). Whereby liberal approaches shape population's behaviour without aiming to fully grasp the object to be governed, China's socialist governmentality has been characterised by a

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<sup>61</sup> In doing so, this thesis joins a number of China area studies which have employed Foucault's toolbox to describe various topics such as crime and punishment (Dutton 1992), policing (Dutton 2005 and 2009), the governance of the work-unit (Bray 2005) and population reproductive policies (Greenhalgh and Winckler 2005).

peculiar Marxist-Leninist belief that the full knowledge of the governed was scientifically possible (Dutton 2009: 35). This supposition gave rise to a “passionately governmental” system of revolutionary governmentality during Mao’s era (Ibid: 24). Within it, “the mentality of government defined life itself” and produced a new kind of political subject, one which was directly deployed against the enemies of the government (Ibid: 35). Such process gave rise to the internalisation of political commitment by political subjects, which “demanded and produced a homologisation of all facets of life” (Ibid).<sup>62</sup>

While after 1978 economic reform policy this type of governmental approach gradually faded away, the biopolitical focus on the population began to intensify in some spheres. One of the most striking examples for that is the recently amended one child policy, which since the 1980s has limited Chinese citizens’ reproduction to one child per couple for the good of the population.<sup>63</sup> The intensification of government concerns on the population during China’s re-entry into the capitalist economic system - as exemplified by the one child policy – appears to be a textbook example for Foucault’s connection between biopolitics and the rise of neoliberalism (Greenhalgh and Winckler 2005: 320). More generally, many of the governmentality features which Foucault observes emerging in modern Europe appear to have characterised China’s mode of power during ancient times (Dutton 1992). An example of this is precisely the millennial tradition of the *hukou* system, which makes China “the first nation to use statistical records to plot and police its people” (Dutton 1992: 3). Similarly, the notion of self-policing individuals - which Foucault sees emergent in modernity as opposed to a coercive and negative traditional power - has characterised

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<sup>62</sup> The political question became so internalised by subjects that “as each person asked this same question of their friends, neighbours and themselves, they found themselves, either through fear or commitment, acting upon it in an intense and passionate way” (Ibid).

<sup>63</sup> Standing Committee of the National People’s Congress Resolution about revising the child-bearing policy(全国人民代表大会常务委员会关于调整完善生育政策的决议), NPC Standing Committee, 28 December 2013.



political rule in the middle Kingdom for millennia (Ibid). As Dutton illustrates, in ancient China policing did not solely depend on state coercion but primarily relied on a complex web of relations, which were ultimately grounded upon the family unit and in turn policed by a maze of self-checking units (Ibid: 3). This type of organisation and capillary policing arguably contributed to maintain China as a unitary politico-legal unit for millennia (Ibid). All these examples appear to allow for the application of a Foucauldian analysis to the Chinese case.<sup>64</sup>

A second caveat has to do with the level at which this comparison will be undertaken. Comparative literature categorises objects of comparisons as falling within levels of macro or micro comparisons: while macro-comparisons deal with accounts of legal systems/legal families/legal cultures more generally, micro-comparisons are instead to do with specific legal phenomena, such as laws or customs and traditional rules (Örücü 2004: 41, 47). Clearly, these two levels complement each other: micro-comparisons presuppose macro-comparisons and vice-versa (Ibid: 41). While this comparative perspective on borders in China and the EU falls within the category of micro-comparisons, the comparative discussion will nonetheless be complemented with an occasional consideration of the macro-comparative level and the main characteristics of the legal systems in question. The introduction to the Chinese legal system at the beginning of Chapter III will enable a better understanding of the legislation and policies constituting borders in the Chinese context which will be dealt with in the rest of the chapter.

A third caveat pertains to the timeframe of the legislation and policies considered. I remarked at the beginning of this chapter that the absurdity of

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<sup>64</sup> To be sure, since the abovementioned phenomena are 'millennial', they may further be said to disqualify an orthodox reading of Foucauldian analysis, which tends to see them instead as products of modernity.

giving a stable essence to borders becomes immediately evident from an historical perspective. The broader the timeframe, the more visible the outcomes. Yet, the analysis will be restricted in this work to the main legislation and policies which have shaped borders in China and the EU over the last sixty years or so. As far as borders of the EU are concerned, the study will consider the evolution of the EU's borders since 1951. In the case of China, the study will concern only the post-1949 People's Republic of China.

A fourth caveat about this thesis is that by concentrating on legal and policy frameworks, it might appear to move to the background the topic of the agency of migrants as political subjects. This is a somewhat unavoidable outcome of a legal perspective which focuses on laws and policies. The notion that apart from governments migrant individuals shape global borders in a way which cannot be reduced to economic factors or migration policies has been acknowledged by mainstream migration studies for some time now (Castles et al. 2014: 317). In this sense, I see human mobility not as an object of migration laws and policies but a phenomenon which, as an agglomerate of individual decisions, impacts on legal and policy frameworks. In this respect, the notion of migration as agency, although it finds no space in this thesis, is always kept in mind in this investigation of how legal frameworks variably shape borders of migration.

A fifth caveat is that throughout this thesis, by speaking of "China" or "the European Union" I might give the impression of conceiving of the two as monolithic actors of migration management rather than the multi-level and complex systems of government that they both are. Different administrative levels sometimes pursue very different lines in migration management. In the EU context, fundamental differences exist between the EU and Member States, and within the EU government itself (such as the European Commission, the Council of the European Union, the EU Parliament, as well as agencies implementing policies such as FRONTEX).

As per the 2009 Lisbon Treaty, the EU is to develop a common immigration policy in order to achieve common rules on: procedures for issuing long-term visas and residence permits, entry and residence conditions for long-term migrants, the rights of migrants living legally in an EU country, tackling irregular immigration and illegal residence, the battle against human trafficking, agreements on the readmission of Third Country nationals returning to their own countries, incentives and support for EU countries to promote the integration of migrants.<sup>65</sup> In this respect, this work will mainly rely upon analyses of the directives and regulations that have been adopted so far.

The Chinese context is characterised by similar levels of complexity. The highest level is the central government, after which follows the provincial level (which apart from provinces includes municipalities, autonomous regions and special administrative regions), the prefectural level, the county level and township and towns level as the bottom of the ladder. Although basic (and often purposely vague) guidelines regulating China's borders are defined by the central government in Beijing,<sup>66</sup> regulations and policies vary substantially across China and exist at a municipal, provincial or local level.<sup>67</sup> While migrant populations are tackled at multiple legislative levels within both the EU and Chinese contexts, this work mainly focuses on legislation at the EU level in the European case and at the central government level in the Chinese case. While different governmental levels and institutions hold different views on migration and pursue different agendas, this thesis mainly looks at the broader picture and will not offer insights into the politics pursued by different institutions within each politico-legal unit which is at

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<sup>65</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Treaty of Lisbon), 17 December 2007, OJ C 306, Art. 79.

<sup>66</sup> See for example 1958 Household Registration Administrative Regulations mentioned above or the legislation establishing temporary residence permits, 暂住证申领办法 (Method for application for temporary residence permits) 2 June 1995, Ministry of Public Security.

<sup>67</sup> Hong Kong, Macau, and Taiwan will not be considered in this work as their immigration legislation is further separated from that of mainland China.

the basis of migration management. Nevertheless, occasionally the discussion will shift to national or local levels, as in the case of the section on external borders in one national case (Italy) in the chapter on the EU, and the section on internal borders in one local government case (Beijing municipality) in the chapter on China. I selected Italy since it is a particularly significant viewpoint from which to analyse the dynamics of EU borders: owing to its peninsular position sharing sea borders with Third Countries, the country is often seen as one of the gate keepers of the European space. The choice to consider Beijing in the Chinese case is due to the fact that China's capital is the city with the most sought-after *hukou* and the strictest *hukou* legislation in the whole of China.

A sixth caveat has to do with the implementation of such legislation, both in the EU and in the Chinese case. In the EU context, the implementation of regulations and directives takes place at the national level. National levels are of course characterised by different characteristics and different levels of implementation, determined by their specific conditions.<sup>68</sup> In the Chinese context, the implementation of the laws issued by the central government cannot be conceived of separately from the policies of the central government and varies significantly across different localities. As will be posited in Chapter III, the different implementation of legislation is facilitated by the intentional vagueness of the formulation of laws at the central level in order to suit different local conditions.

A final caveat pertains to the limits of this comparison. As observed with reference to Legrand, the practice of comparison has the potential of revealing that any object in comparison is not ultimately contained or containable by a researcher's gaze (Legrand 2005: 717). As I added with

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<sup>68</sup> An example of great differences in implementation is the implementation of the Directive on Blue cards. For example, according to the latest statistics available, some 12.000 blue cards had been issued in Germany against 165 in Italy and 3 in Finland as of 2014. [http://ec.europa.eu/immigration/bluecard\\_en](http://ec.europa.eu/immigration/bluecard_en) Accessed 5 September 2017.

reference to Ruskola, scholars cannot but employ their own preconceptions about law when approaching other contexts and this should prompt them to self-reflect on the circumstances under which their investigations are carried out. As far as this work goes, my background is European, having studied Eurocentric curricula most of my life. A two-year period of research in Beijing helped to form my perspective. Sometimes, when studying or dealing with Chinese law, I found myself suspending judgments and treating the Chinese politico-legal context as a phenomenon that could not be fully grasped. At other times, being a passionate Sinophile, I found myself intellectually shielding “China” while being more critical of the European context. On other occasions, I have been defensive of the framework of the European context instead. In all, this work appreciates that a definitive and comprehensive grasp of either European or Chinese borders is ultimately impossible. For this reason, the goal of this work will be to employ the comparison with China to gain a fresh perspective on borders and their trend of securitisation in the EU context, the one that I know better. As mentioned in the opening of this chapter, the idea is that the best way to know the “true shape” of mount Lu is not remaining in its interior but exiting it, for distance enables to catch a better sight of its form.

### *Conclusion*

Rebutting conventional views of borders as self-evident geographical lines, this chapter began by dispelling the notion that borders are fixed and natural entities. In its place, it advanced a working definition of borders as shifting legal processes governing migration, made of shifting conglomerates of laws, policies and measures which operate as obstacles, impediments or incentives to mobility across politico-legal spaces. This definition was largely indebted to Foucault’s insights on governmentality as well as those who have connected such insights with issues of borders and migration. Within the same Foucauldian framework, I defined the securitisation of migration as a restrictive and exclusionary practice primarily oriented towards the

management of the population - both local and migrant - which is observable over a certain timeframe within legislative measures, policies and official statements. Afterwards, the perspective of comparative migration law was individuated as the most apt viewpoint from which to investigate EU borders. I moved on to discuss the reasons for selecting China as a main term of comparison. After that, the chapter delved into the “how” of the comparison, drawing attention to the epistemological biases existing when dealing with non-Western legal contexts from a Western perspective. This led to a reflection on the limits of this thesis by considering the possible biases of its author.

Carrying the argument of Chapter I forward, Chapter II begins this comparative task by looking at the recent history of the borders regulating internal and external migration in the EU. This will be followed by an examination of the legal categories and profiles available to migrant individuals in the EU. This detailed and descriptive analysis will allow me to individuate the main trends orienting migration management in the EU context.

## CHAPTER II

### **Shifting borders in the European Union: recent history, categories and trends**

#### *Introduction*

Borders in the EU are not a subject to be dealt with in a linear manner. Over the last sixty years or so, since its 1951 inception as the European Coal and Steel Community, the shape and scope of what is today known as the European Union has transformed numerous times through processes of enlargement and integration among Member States. On the one hand, enlargements have expanded the territory of the European Union. On the other, EU integration has progressively minimised restrictions on movement among Member States. Currently, EU citizens can enjoy freedom of movement and establishment in any other Member State of the Union and their movement is described as mobility rather than migration. The notion of migration in contemporary Europe is instead related to non-EU citizens. As shall be seen in this chapter, the supposed “vanishing” of internal borders within the EU for the nationals of Member States has shifted the enforcement of borders to the Union’s perimeter, towards the nationals of Third Countries. This shift has entailed an increasing securitisation of non-EU migration, as was briefly introduced in the former chapter.

According to the latest statistics available, in 2016 a total of 54.4 million migrants resided in EU Member States: among these, an estimated 19.3 million people came from Third Countries while approximately 35.1 million people held citizenship of another EU

Member State.<sup>69</sup> While the mobility of non-EU citizens is increasingly dealt with as a phenomenon that needs to be governed and restricted, the movement of EU citizens within the European space is instead encouraged and even necessary (although not sufficient) to enjoy full EU citizenship. The analysis in this chapter will draw on EU law<sup>70</sup> as well as national legislation and policy documents, the jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights, the judgements of which are binding on all Member States. The narration will also rely upon socio-legal and migration studies as key sources to interpret the interaction between legislation and its practical implementation. This hybrid approach is made necessary by the very nature of human mobility, a phenomenon that - as posited in the previous chapter - is influenced by legal and policy frameworks but never fully determined by them, insofar as it always exceeds formal categorizations and mechanisms of control.

The chapter begins with an outline on the recent history of the borders regulating the internal and external migration in the EU since its 1951 inception as the European Coal and Steel Community. Section one will provide an overview of the evolution of free movement rights for EU Member State nationals within EU legislation. I will observe that although the principle of free movement of persons was historically one of the main goals of integration, at the outset the mobility of Member State nationals to other Member States was conceived merely as an economic occurrence – a corollary to the free movement of goods and capital. Although this account of EU's internal borders will mainly focus

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<sup>69</sup> *Supra*, footnote 6.

<sup>70</sup> EU-wide rules can be of two types: the first one is legislative acts, such as regulations and decisions, which are immediately applicable in all EU Member States and do not require amending national laws. The second and most common type within EU immigration framework are directives, which consist of rules that Member States have to integrate into their national legislation by a specific deadline. While the results to be attained as stated in the directives are binding, Member States can decide the form and methods to accomplish them.



on the shifts in legal norms and jurisprudence, I hold that the main constitutive force of the Union as a political space has been the actual movement of EU citizens within the Union, which established it as a political space and unmade the divisions demarcating EU territorial spaces (Tuitt 2010: 177). This consideration is illustrated by the most recent developments in EU jurisprudence, as the actual movement of EU citizens across internal borders has been indicated as the condition upon which full enjoyment of the additional rights derived from EU citizenship is granted. Even if internal borders have generally vanished for most EU citizens, I observe that important qualifications to the enjoyment of such additional rights still apply.

The consideration of the history of the legislation constructing the EU external border in section two will testify how the progressive minimisation of internal borders in the EU was accompanied by a strengthening of its external borders towards Third Country Nationals. Section two will provide an historical overview of the laws and policies regulating the mobility of Third Country Nationals into the EU. This will be followed by an examination of the variety of the legal categories and profiles available to migrant individuals in the European Union. As the EU's external borders currently constitute the greatest obstacle to human mobility in contemporary Europe, the chapter will dedicate a greater amount of space to them than to the EU's internal borders. Since the implementation of the EU legal framework takes place at a national level, the chapter will then observe the EU border at close range by looking at the case of Italy. The chapter will provide an historical outline of Italy's immigration legislation and, similarly to what was done in relation to the EU case, I will examine the main legal categories of migration for non-EU citizens in the Italian context. The final section will reflect upon the main trends of migration management in contemporary EU. I will remark that despite the economic underpinnings of EU migration management, the nexus between migration and the economy is rarely articulated in

migration legislation and official language. Together with security, I will observe that humanitarian concerns have instead become a key overarching category in non-EU migration management.

## PART I. HISTORY OF THE INTERNAL BORDERS OF THE EU

### *1. Evolution of the notion of freedom of movement of EU citizens*

One of the most remarkable features of the EU politico-legal space has been its frequent variations of borders and the categories of populations newly included and excluded as a result of such changes. This section will provide an historical overview of the internal borders of the European Union since the establishment of the European Union. It will show that while the principle of free movement of persons has historically been one of the main goals of European integration since its origins, restrictions to mobility within the Union have not only been lifted, but also the internal mobility of nationals of Member States appears to have become the very condition of enjoyment of full EU citizenship rights. As will be seen, the affirmation of this principle, which has coincided with the ostensible erasure of internal borders of migration among EU countries, has been gradual. The section will conclude that while internal borders have generally vanished for EU citizens, some qualifications to such movement still apply.

The principle of free movement of persons within the EU was laid down by the 1957 Treaty of Rome as one of the main goals of the integration of its members, the other two being free movement of goods and capital.<sup>71</sup> Remarkably, the Treaty associated the notion of “person” with the figure of workers and producers: the persons exercising free movement pictured in the original Treaty were economically active

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<sup>71</sup> Treaty establishing the European Economic Community (Treaty of Rome), 25 March 1957, Art. 48.

individuals, whose mobility was functional to the construction of a single European market (Olsen 2006: 5-6 in Mantu 2011: 130). Apart from “economically irrelevant persons”, the notion of freedom of movement of persons enshrined in the founding Treaty of the then European Community further excluded Third Countries’ nationals<sup>72</sup> (Mantu 2011: 230). Despite the theoretical establishment of freedom of movement of Member States’ nationals in the Treaty, the practical implementation of this freedom for self-employed or waged workers from European Member States occurred very gradually. At the end of the 1960s and the beginning of the 1970s a regime of free movement for European workers began to take shape through a number of regulations setting the conditions for the implementation of free movement of workers.<sup>73</sup> These regulations were aimed at standardising matters such as the prohibition of nationality-based discrimination between workers of Member States, conditions of work, remuneration, dismissals and standards of social security.<sup>74</sup> Despite such regulatory framework has been amended and expanded in the 1990s,<sup>75</sup> most of the key principles set at the time still apply to these days. The then Court of Justice of the European

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<sup>72</sup> In the rest of this work I shall use the term Third Country Nationals to indicate those individuals who do not have the nationality of an EU Member State.

<sup>73</sup> EU Council Regulation No. 1612/68 concerning the free movement of workers, 15 October 1968, OJ L 257/2; EU Council Directive 68/360 on the Abolition of Restrictions on Movement and Residence within the Community for Workers of Member States and Their Families, 15 October 1968, OJ L 257/13; EU Council Regulation No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, 14 June 1971, OJ L149/2.

<sup>74</sup> According to Regulation No 1408/71 (see *supra* footnote 73) these are: equal treatment between national workers and workers from other Member States; a national exercising his or her right of work and establishment in another Member State is covered by the legislation of each relevant country; when he or she claims a benefit, previous periods of insurance, work or residence in other countries are taken into account if necessary; if he or she is entitled to a cash benefit from one country, this can be received even if he or she is living in a different country.

<sup>75</sup> EU Parliament and Council Regulation No 883/2004 on the coordination of social security systems, 29 April 2004, OJ L 200; EU Parliament and Council Regulation No 987/2009 laying down the procedure for implementing Regulation No. 883/2004 on the coordination of social security systems, 16 September 2009, OJ L284.

Communities (CJEC) - challenging administrative decisions at the national level – has had a crucial impact in implementing and widening the scope of free movement of workers within Member States.<sup>76</sup> As a result, the freedom to migrate and work in another Member State began to be granted to economically active persons such as self-employed individuals and waged workers.

Progressively, the judgments of the CJEC further extended the notion of protection of workers' free movement rights to internal migrants with seasonal jobs, part-time employment or traineeship in Member States.<sup>77</sup> In 1990 a number of directives were adopted with the aim of granting residence rights to nationals of Member States other than workers: employees and self-employed persons who have ceased their occupational activity,<sup>78</sup> students<sup>79</sup> and the unemployed, as well as their families.<sup>80</sup> Nevertheless, such measures remained conditional upon the existence of sufficient financial means and a private health insurance for any of the aforesaid categories of individuals moving to other Member States. The activism of the Court of Justice and its expansive interpretation of the Treaty played a fundamental role in extending the

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<sup>76</sup> See for instance CJEU, C-15/69, *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola*, 15 October 1969 where the Court ruled that the free movement of workers requires the abolition of any discrimination based on nationality between workers of the Member States regarding employment, remuneration and other conditions of work and employment; CJEU C-152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost*, 12 February 1974, where it was established that the rules on equality of treatment within European law forbid open discrimination due to nationality as well as covert forms of discrimination which lead to the same outcomes.

<sup>77</sup> See for example CJEU Case C-66/85, *Lawrie-Blum v. Land Baden-Württemberg (Germany)* 3 Jul 1986, establishing the free movement of trainees; *D.M. Levin v Staatssecretaris van Justitie*, C-53/81, 23 March 1982, establishing the notion of an employed person with an income less than the minimum legal wage (part-time work).

<sup>78</sup> EU Council Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity, 28 June 1990, OJ L 180.

<sup>79</sup> EU Council Directive 90/366 on the right of residence for students, 28 June 1990, OJ L180.

<sup>80</sup> EU Council Directive 90/364 on the right of residence, 28 June 1990, OJ L 180.

notion of free movement of economically active persons to other categories of nationals of Member States.<sup>81</sup>

## *2. The advent of EU citizenship*

In 1992, the Treaty of Maastricht instituted freedom of movement and residence for all nationals of EU Member States in other Member States as the cornerstone of Union citizenship, entitling all citizens of EU Member States to freely move and work around the EU. Providing a “brand new political and social meaning to the debate”, the Treaty represents a shift from a notion of freedom of movement originally conceived as a mere economic occurrence to one where mobility across the internal borders of European states for all categories of people became a distinctive attribute of EU citizenship as such (Carrera 2005: 700-701). As a result, the internal mobility of Member State nationals within the Union progressively became a fact of life. These developments were also advanced by the coming into effect of the Schengen area in 1995 – implementing the 1985 Schengen Agreements - generating a common area without borders among the signatory Member States (UK, Ireland and Denmark originally opting out).<sup>82</sup> Since the 1995 implementation of the Schengen agreements, border checks at the national borders internal to the Schengen area have thus been officially abolished.

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<sup>81</sup>See for example CJEU Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern*, 12 May 1998. The applicant was a Spanish national legally resident in Germany since the age of twelve to whom German authorities had refused to issue a residence permit and to give her a child-raising allowance on the grounds that she was not German and did not have a residence permit. The Court ruled that a national of a Member State could be included within the scope of citizenship provisions. The case became the first to explore the extent to which a non-economically active person can receive social benefits in another Member State.

<sup>82</sup> Currently, the UK and Ireland are still opting out of Schengen while Denmark is now part of the Schengen area.

While EU internal borders have been substantially lifted for most EU citizens, the internal borders of the Union still affect the mobility and freedom of establishment of another group of people: Third Country Nationals already in the EU. As just mentioned, the 1993 Maastricht Treaty introduced EU citizenship and free movement for the nationals of Member States. The millions of Third Country Nationals residing in a Member State at the time, however, have been excluded from the process.<sup>83</sup> Similarly, even though the 1995 implementation of the Schengen agreements has inaugurated the beginning of an area of freedom and mobility automatically also allowing the mobility of Third Country Nationals within it, Third Country Nationals – regardless of whether they have long-term or permanent rights of residence in an EU country - do not enjoy any citizenship right across the European space. In other words, freedom of movement within the Schengen area is the only right they have acquired throughout the process of supposed removal of EU internal borders (which, as shall be seen later in this chapter, has entailed a general strengthening of the external borders).

Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States marked an ulterior phase of the European internal migration regime for EU citizens.<sup>84</sup> The Directive advances the rights to entry, residence and equal treatment for EU citizens moving to another Member State. It further established the right of permanent residence to those EU citizens and their family members (EU or Third Country nationals) who have legally resided for a continuous period of five years

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<sup>83</sup> According to some, this has problematically created a new discrimination which did not previously exist in the EU space between EU citizens and Third Country Nationals as “second class citizens” (Balibar 2003: 44).

<sup>84</sup> European Parliament and EU Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 30 April 2004 OJ L 158/77.

in the host Member State.<sup>85</sup> For EU nationals who are not workers or self-employed, the right of residence remained contingent upon their having sufficient financial means not to become a burden on the host Member State's social system.<sup>86</sup>

### *3. Freedom of movement and restrictions to EU citizenship rights*

A critical exception to the right to work and establish in other Member States for EU citizens relates to EU enlargement. The majority of “new” Member States have faced an initial restriction included in Accession Agreements on their nationals’ access to the labour markets of most of the “old” Member States.<sup>87</sup> Through the latter, the majority of “old” Member States instituted arrangements limiting the rights of workers and service providers from “new” Member States to work and reside within their territories for up to seven years from their accession.<sup>88</sup> The limitation for the nationals of most “new” Member States to reside and work within most of “old” Member States was justified as a measure to protect “old” Member States national labour markets. After the 2004 enlargement, only Ireland, Sweden and the United Kingdom allowed the citizens of Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia unrestricted access to their labour markets. After the 2007 enlargement, all the “old” Member States – except for Finland and Sweden - enacted restrictions on Bulgarian and Romanian nationals. As Croatia joined the EU in 2013, its nationals are still subject to such restrictions in several Member States.<sup>89</sup> For the nationals of these new Member States, internal borders continued to apply for some years and in some cases still persist. Although provisional, such restriction to freedom

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<sup>85</sup> *Supra*, Art. 16.

<sup>86</sup> *Supra*, Art.7.

<sup>87</sup> Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Cyprus and Malta joined the EU in 2004, Bulgaria and Romania in 2007 and Croatia in 2013.

<sup>88</sup> For Bulgaria and Romania, the limitations ran from 2007 until 2014.

<sup>89</sup> The restrictions still apply in Austria, Malta, the Netherlands, Slovenia and United Kingdom.

of movement for work and establishment relegated or still relegate the nationals of most of the “new” EU Member States to an ambiguous status of legal residents, but illegal workers (Kubal 2013: 556), which some have aptly described as one of “semi-citizenship” (Rigo 2007: 152).

As regards free movement within the Union, Third Country Nationals already in EU Member States hold a similar, although permanent, ambiguous status. Although at a first glance the creation of an area of free movement has also brought about freedom of mobility for Third Countries Nationals, internal borders continue to apply to this category of persons. As a matter of fact, the entitlement to mobility within the Schengen area has not granted them any related rights to work or establishment. The situation of Third Country Nationals already in the EU was clarified by a 2010 Directive which stated that Third Country Nationals who hold a residence permit (or a long-term visa for more than 3 months) issued by any EU Member State are allowed to move without restrictions to other countries of the Schengen zone for a period of up to 3 months in any half year.<sup>90</sup> If they exceed this timeframe, they should promptly be required to return to their “original” Member State.<sup>91</sup> Longer presence in a country where one does not hold a residence permit will result in over-staying. This is the case of Third Country Nationals who for instance have residence documents in one EU Country but, being unable to find work there, work illegally in another EU Country living in a semi-legal limbo where they have to frequently travel back to their EU country “of origin” in order not to over-stay (Rytter 2012, Kubal 2013).

#### 4. *A neo-nomadism of EU citizens?*

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<sup>90</sup> EU Parliament and Council Regulation 265/2010 amending the Convention implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa, 25 March 2010, OJ L85/1.

<sup>91</sup> *Supra*, p. 2



While movement across Member States is not encouraged by EU law for Third Country Nationals, the opposite can be said for EU citizens. The nexus between exercise of freedom of movement within the territory of the Union and citizenship rights has been expanded in scope by recent rulings of the CJEU. These rulings have argued over matters traditionally under the realm of national sovereignty, such as that of granting or revoking citizenship<sup>92</sup> or giving authorisation to reside and work on a territory.<sup>93</sup> Not only the exercise of free movement and residence in other Member States is a defining feature of EU citizenship: in cases of family reunification with Third Country nationals, recent rulings have emphasised that the exercise of such right is the very condition upon which rights such as the authorisation to reside and work for Third Country family members of EU nationals can be granted.<sup>94</sup> In some cases, the EU framework provides EU citizens with extra rights that they would not have if they did not move across the internal borders. An example of this is family reunification with Third Country nationals: while in some EU countries such as the UK or Austria the national legislation makes reunification conditional to specific financial income

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<sup>92</sup> CJEU Case C-135/08, *Janko Rottmann v Freistaat Bayern*, 2 March 2010. Mr Rottmann was an Austrian national who, having acquired German nationality via naturalisation, had omitted to inform the German authorities that he was under judicial investigation in his country of origin. Once the German Court learnt about this, it invalidated Rottmann's naturalisation. However, pursuant to Austrian law, such naturalisation had already resulted in his loss of Austrian nationality. In this case, the CJEU ruled that the resulting situation of Mr Rottmann may only happen after applying a proportionality test to such a withdrawal.

<sup>93</sup> See for example CJEU Case C-34/09 - *Gerardo Ruiz Zambrano v Office National de l'Emploi*, 8 March 2011. In *Zambrano*, the CJEU ruled that the Colombian parents of two Belgian children born and raised in Belgium who had never exercised their rights of free movement to another Member State - could not be deprived of residence and work permits, as denying them would have entailed forcing EU citizens to leave the territory of the Union as a whole.

<sup>94</sup> See for example CJEU Case C-256/11 *Murat Dereci and Others. v. Bundesministerium für Inneres*, 15 November 2011. *Dereci* is a joint case of five applicants, all of them Third Country nationals asking to reside in Austria with their Austrian family members, their family members not having exercised their free movement rights to another Member State. The Court ruled that an EU citizen who has the option to reside with his or her family member in another Member State does not satisfy the condition of deprivation of genuine enjoyment.

thresholds to be met, these thresholds do not apply to the nationals of other Member States in the UK or Austria, nor to the UK or Austrian citizens living in other Member States. In this way, the mobility of EU citizens across EU Member States, complementary to the erasure of internal borders, has been encouraged by the current legal framework, which appears to promote a sort of “neo-nomadism of EU citizens” (Rigo and Zagato 2012: 281). However, remarkably, these EU citizens on the move need to be either economically active or have sufficient financial means, as the Court has further specified.<sup>95</sup> According to Rigo, this stance “brings back through the window what the progressive interpretation of the Treaties had thrown out the door”, namely the fact that only economically active individuals can enjoy full EU citizenship rights (Rigo 2015, my translation). By negating full citizenship rights to economically inactive citizens or citizens who do not exercise their right to free movement, the latest developments in the jurisprudence seem to suggest that the model recipient of EU citizenship rights is by default an economically active person on the move.

As this brief historical-legal perspective has shown, internal borders of migration for the nationals of Member States have undergone significant shifts as EU integration has progressively removed barriers to freedom of movement, establishment, work, and enjoyment of welfare benefits across Member States. The principle of free movement of persons engraved in the Treaty of Rome has evolved from a black letter law provision to a common practice of free movement and establishment across the European space for EU Member State nationals. The right of

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<sup>95</sup> CJEU Case C-86/12, *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, 10 October 2013. Adzo Domenyo Alokpa was a Togolese national who sued Luxembourg for rejecting her application for a residence permit as a family member of a European Union citizen – her two young sons were French nationals via paternal bloodline – due to her lack of financial means to support herself. The Court in this case ruled that the two children could enjoy social assistance in France, implying that France had ultimate responsibility over her two (economically inactive) nationals.

free movement was originally introduced for economically active citizens of EU Member States, namely workers and the self-employed. It was expanded to other categories, such as students, family members, and retirees.

Despite substantial achievements since the inception of the European Union, internal borders have not been erased at the same speed for many nationals of Member States of recent accession. More strikingly, Third Country Nationals already residing and working in the EU have been kept out of the process. This has given rise to statuses of semi-legality for Third Country Nationals working or overstaying in Member States other than the one from which they have a visa. I further noted that although internal borders have been generally erased, the latest judgements of the CJEU have specified that internal borders still exist for those EU citizens who fail to pass the financial means test. In other words, a system of stratified rights (Morris 2003) – as I put forward in Chapter I – appears to characterise the governance of EU citizens on the move. As shall be seen in Section three, the economic means test is also a determining factor in the assessment of the desirability or dangerousness of non-EU nationals, the ones who are most affected by EU borders. But first, the next section will provide an historical overview of the legislation and policies constituting the EU border regulating the mobility of non-EU citizens into the Union.

## PART II. HISTORY OF THE EXTERNAL BORDERS OF THE EU

### *5. From guest workers programmes to the goal of “zero” immigration*

Tracing a history of border controls restricting the movement of Third Country Nationals entering the EU is difficult for various reasons. First, due to its enlargements, the size and shape of the EU have

substantially changed over the last fifty years. Second, these enlargements have also changed the status of some of the residents in EU Member States. For instance, after EU enlargements, some individuals have moved from an irregular migrant status in an EU Member State, to EU citizens when their country of nationality joined the EU (Guild 2011: 213). Third, before the common migration policy and the creation of the Schengen area, immigration into the European Union was a national issue, dealt with in different ways across European Member States. Maintaining the notion of EU external borders as a mutable variable, scholars often note that immigration into and within the EU by the nationals of non-EU Countries boomed in the wake of the Second World War, prompted by post war reconstruction labour demand, immigration from Eastern bloc countries and decolonisation (Papadopoulos 2012: 24). All the highly industrialised countries of North Western Europe put in place temporary labour recruitment schemes at some stage between 1945 and 1973, although such schemes played a smaller role than spontaneous immigration of workers (Castles et al 2014: 104). The first wave of migration to Northern European countries such as Belgium, Germany and the UK mainly consisted of surplus workers from Mediterranean countries, parts of Eastern Europe. Subsequently, in the 1960s and 1970s workers from decolonised countries were encouraged by private employers and governments to deal with labour shortages and revive the war-ravaged economies of Western Europe (Messina 2007: 20-21). Labour migration thus became the main legal category of migration into North Western European countries.

However, in 1973 the “oil price shock” and the fear of economic stagnation associated with it drove governments to strictly curb immigration of foreign workforces (Papadopoulos 2012: 24). An official halt on the employment of new workers and the introduction of voluntary repatriation schemes for foreign workers by various Northern European governments led to a progressive decline in the ratio of

migrant labourers in Member States' workforces (Messina 2007: 25). As a result of the closure of guest worker programs in the 1970s, migration through the assertion of rights to asylum and family reunification became the main legal routes to enter Western Europe. This approach of closure was replicated at the European level and is reflected in various EU Commission policy documents from the 1970s to the late 1990s, promoting an official line advising against labour migration into the EU from non-OECD countries (Hansen 2016: 7).<sup>96</sup>

#### *6. External borders and the promotion of EU citizenship*

At times described as a process of erasure of national borders, EU integration appears to have strengthened and transferred borders to the perimeter of the Union. This trend has been described as the “EU borders’ paradox”, whereby the pursuit of an unrestricted free movement of persons within the EU has paradoxically produced measures reinforcing and multiplying external border controls (Mitsilegas 2009: 33). The increased coordination on the control of the movement of Third Countries Nationals at the external borders has run parallel to the constitution of EU citizenship. As Hansen and Hager have argued, the then official line of the Commission to achieve “zero” labour immigration from non-EU countries served the Commission to promote EU citizenship (Hansen and Hager 2012: 144). The very term “immigration” (as referred to non-EU migrants) appeared for the first time in a EU treaty precisely in the 1992 Maastricht Treaty instituting EU citizenship. The treaty further established a Third Pillar on Justice and Home Affairs aimed at improving cooperation on internal security among other issues. The Amsterdam Treaty in 1997 further promoted the EU as an area of freedom, security and justice, where free movement

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<sup>96</sup> See for example Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM (94) 23 final, 23 February 1994.

would be guaranteed in conjunction with security measures pertaining to external border controls, asylum, immigration and crime prevention.<sup>97</sup>

Not only the emergence of an EU-wide migration policy towards non-EU nationals has run parallel to the institution of EU citizenship: as scholars have argued, when looking at the legal reasoning behind it, the institute of EU citizenship is in fact constitutively built on the exclusion of Third Country Nationals (Lindahl 2009, Mitsilegas 2009, Rigo 2007). To put it with Hans Lindahl,

[t]he so called area of Freedom, Security and Justice ambition is to give fully-fledged institutional form to a *jus includendi et excludendi*, a right to include and to exclude for the EU: a right to determine which aliens might enter, remain in or be expelled from the EU... Yet a closer consideration of the relevant provisions of the Amsterdam Treaty and beyond, and of all earlier treaties leading back to, and including the Treaty of Rome, reveals a circularity that governs the purported *jus includendi et excludendi* to be exercised via the AFSJ: a right to inclusion and exclusion is held to be justified because the EU is the common place of its citizens; yet, to begin with, acts of inclusion (and attendant exclusion) give rise to European citizens and their allegedly common place (Lindahl 2009: 1).

The definition of European citizenship and its space through acts of exclusion of non-EU citizens from the project uncritically framed the membership to the European polity as a sum of Member States memberships, and failed to take into account the claims of long-term resident Third Country nationals for inclusion (Kostakopoulou 2000:

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<sup>97</sup> Treaty of Amsterdam, 10 November 1997, OJ C 340, Title III A on visas, asylum, immigration and other policies related to free movement of persons.

510). The notion of exclusion of Third Country nationals has been further presented in official discourses as “security enhancing”: in other words, “the enforcement of the law against migrants is said to have been dictated by the need on the part of the Union to fulfil its obligations to Union citizens” (Ibid).

### *7. The securitisation of non-EU migration*

The securitisation of migration consolidated the notion of European collective identity versus a “dangerous” non-EU migrant population, as the institution of free movement activated by the Schengen process prompted Member States to increasingly bring together issues of border control, migration, terrorism and so on under the umbrella of security (Bigo 1996: 112–145). According to Huysmans, these legal developments should be further seen as part of an overall spill-over in the European integration process, whereby the “radically speeding up of the institutionalization of the internal market” through the erasure of border controls had the “Europeanisation of the control of abusive use of free movement” as a political correlate (Huysmans 2006: 85). According to this view, the security policy which has developed to govern free movement in the EU has taken place both through border controls “aimed at externalizing excessive free movement” (Ibid: 101-2) as well as through biopolitical technologies internalizing threats to the European population (Ibid: 102). Examples of the latter include the introduction of European databases such as EURODAC,<sup>98</sup> the Schengen Information

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<sup>98</sup>EURODAC is a system set up in 2000 to assist European Member States in the identification of asylum applicants and persons who have already been apprehended in connection with an irregular crossing of an external border of the Union. EU Council Regulation 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, 11 December 2000, OJ L 316/1.

System<sup>99</sup> and the EU common Visa Information System<sup>100</sup> have been aimed at classifying Third Country migrants into categories to better prevent or restrict their mobility (Huysmans 2000 and 2006, Bigo 2000). While the movement of Third Country nationals has been increasingly perceived as a phenomenon that needs to be governed, the mobility of Member State nationals across borders is instead encouraged.

As already mentioned in Chapter I, the increasing connection of migration law with the issue of criminality at both EU and national level could be seen as an advancement of the trend of securitisation of migration.<sup>101</sup> The increased use of substantive criminal law to control and punish migration law violations as well as in the practice of migrant surveillance and detention adopted in all EU Member States since the 1990s would be evidence for it. Mechanisms of prevention and pre-emption before migrants reach the EU borders would further be part of such securitisation of migration (Mitsilegas 2015: 2). For some, increasingly restrictive regulations towards migration from non-EU Countries would have also indirectly contributed to de-legitimise and securitise the presence of non-EU migrants in the EU (Huysmans 2006: 64).

It should be noted that all the legislative measures which will be considered below as part of the general trend of securitisation of non-EU migration make reference in their preambles to the EU's fundamental

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<sup>99</sup> EU Council Decision on the development of the second-generation Schengen Information System (SIS II), 6 December 2001, OJ L 328; Council Regulation 2424/2001 on the development of the second-generation Schengen Information System (SIS II) 6 December 2001 OJ L 328.

<sup>100</sup> The system exists for the exchange of visa data between Member States and carriers which consolidated the external borders of the EU as far as records on decisions on short-stay visa applications are concerned. EU Council Regulation 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), 9 July 2008, OJ L 218.

<sup>101</sup> As already specified in Chapter I, in this work I consider the notion of securitisation of migration as undistinguishable from the notion of "criminalization of migration".



rights commitments (Guild 2010: 17). Clear references are normally made to the duties of Member States under the European Convention on Human Rights<sup>102</sup> and, in asylum matters, to the 1951 UN Refugee Convention.<sup>103</sup> However, the recognition of these commitments does not seem to influence in practice the increasing criminalisation of non-EU migration (Ibid).

#### *8. Strengthening the EU's external borders*

Several measures at the EU level have pushed the criminalisation of non-EU migration agenda. In 2002, the Facilitation Directive introduced criminal sanctions for any EU citizen “assisting” an irregular migrant’s entry, transit and residence in the territory of a Member State if done for financial gain.<sup>104</sup> At the national level, such “offence of solidarity” is variably framed across different Member States. Some Member States sanction the facilitation of entry and stay with fines or custody, others with both. Some make exceptions for humanitarian assistance, while others do not.<sup>105</sup> The 2004 establishment of the External Borders Agency (FRONTEX) is a further manifestation of the growing securitisation trend in EU migration policies. FRONTEX was created with the aim of coordinating joint operations by Member States at the EU external maritime, land and air borders of the Schengen area, covering around 44,000 km of external maritime borders and nearly 9,000 km of terrestrial

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<sup>102</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

<sup>103</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>104</sup> EU Council Directive 2002/90 defining the facilitation of unauthorised entry, transit and residence, 28 November 2002, OJ 2002 L 328/17. Ireland and Denmark have opted out of this directive.

<sup>105</sup> Penalties differ greatly among Member States. The maximum fine for facilitating entry and stay is €78,000 in the Netherlands and up to €100,000 in Spain. In Greece, facilitation of entry prison terms can be up to 10 years while in the UK the law provides for a maximum of 14 years. Some Member States may sanction humanitarian assistance and consider it a means of facilitating the entry and residence of irregular migrants (e.g. Belgium).

borders.<sup>106</sup> While this agency has not fully substituted Member States in the task of securing the external borders of the EU, its creation further represents a shift in the exercise of border controls, typically a national prerogative. Crucially, FRONTEX actions are not subject to the legal and political liability of national governments (Baldaccini 2010: 230).<sup>107</sup>

Together with the already mentioned introduction of restrictive visa regimes which can deter nationals from Third Countries to obtain a visa to the EU, the strengthening of the EU external borders has further been observed in their externalisation. An example of the latter has been the expansion of carriers' obligations with the scope of preventing irregular migration (Ryan 2010: 22). Since 2004, carriers are required to communicate passengers' data and financial penalties are imposed on carriers transporting into the territories of EU Countries non-EU nationals lacking the necessary admission documents.<sup>108</sup> The 2005 EU Global Approach to Migration further played a significant role in the externalisation of EU borders through partnerships with non-EU Countries aimed at fighting irregular migration and improving links between migration and development.<sup>109</sup> Under this approach, Member States, both at the EU and national level, have entered into mobility partnerships with a number of Third Countries, which have introduced frameworks of mutual offers of pledges on migration and asylum issues

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<sup>106</sup> EU Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26 October 2004, OJ L 349/1.

<sup>107</sup> While previously in FRONTEX publications no mention was made of human rights, protection of lives or asylum, since 2008 the agency has gradually adopted a marked language of human rights and humanitarian protection (Perkowski 2012: 26).

<sup>108</sup> EU Parliament and Council Directive 2004/82 on the obligation of carriers to communicate passenger data [2004] OJ L 261.

<sup>109</sup> Commission Communication, Priority Actions for responding to the challenges of migration: First follow-up to Hampton Court, COM (2005) 621 final, November 30 2005.

(visa facilitation, return of irregular migrants through readmission agreements).<sup>110</sup>

The external dimension of asylum and migration into the EU was also emphasised by the 2005 EU Justice and Home Affairs programme (“Hague programme”) encouraging the establishment of partnerships with countries and regions of transit and countries of origin of migrants and asylum seekers.<sup>111</sup> Claiming that “insufficiently managed migration flows can result in humanitarian disasters”, and expressing “utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally” the programme called for an intensification of border management aimed at “preventing further loss of life.”<sup>112</sup> According to Cuttitta, statements such as this one are exemplary of the beginning of a new process of association of migration management and humanitarian concerns, whereby the latter are employed to justify the intensification of the former (Cuttitta 2015: 133).

### *9. Migrants’ detention and the privatisation of migration controls*

Another key migration management device has been the practice of administrative detention of irregular migrants which was introduced in the 1990s in all Member States, as will be exemplified by the Italian case. While Member States defend this measure as necessary to preserve the integrity of their borders and national security, an “official haziness” characterises national practices of immigration detention (Cornelisse

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<sup>110</sup>Over the last few years, a number of EU Member States have concluded Mobility Partnerships and/or visa facilitation agreements and readmission agreements with Ukraine, Moldova, Georgia, Armenia, Azerbaijan, Cape Verde. Other endeavours at the EU level include the establishment in 2008 of a Centre for Migration Management and Information (Centre d'Information et Gestion des Migrations, CIGEM) created through an agreement between the European Union and Mali. Similarly, the EU also instituted a National Agency for the Promotion of Employment and Skills (ANAPEC) in Morocco for the management of European job offers.

<sup>111</sup> EU Council, Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 3 March 2005, OJ C 53/1.

<sup>112</sup> *Supra*, section 3, subsection 1 point 6. 1.

2010: 8). Detention of irregular migrants can take place on arrival for the purposes of processing asylum requests and detention for the purposes of removal (Guild 2006: 5 in Cornelisse 2010: 8). Migrant detention upon arrival is aimed at precluding Third Country Nationals' illegal entry and/or at verifying their identity and lawfulness of entry. This type of detention can fluctuate between one day to weeks, months or years, only in some EU Member States the maximum length of such measure is regulated by law (Ibid: 10). Administrative detention has also become a common measure in processing asylum seekers' applications. While the circumstances, maximum length and actual detention period differ extensively across Member States, minimum standards for the reception of asylum seekers were set at the EU level in 2003 and recast in 2005 and 2013.<sup>113</sup> According to the latest 2013 Directive, Member States may not carry out an interview in the asylum process in certain limited conditions.<sup>114</sup> Moreover, the right of asylum seekers to an effective remedy is acknowledged, together with time restrictions on applications to challenge asylum decisions, which are subject to reasonable time limits and other necessary procedures for the applicant to exercise the right to an effective remedy.<sup>115</sup> Lastly, the detention of Third Country Nationals can be enforced as a consequence of an order of deportation or removal.

In most Member States, whenever a Third Country National has been mandated to leave the national territory the possibility of administrative detention is contemplated by law (Ibid: 15). In 2008, the so called "Returns Directive" stipulated that detention with no reasonable

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<sup>113</sup> EU Council Directive 2003/9 laying down minimum standards for the reception of asylum seekers, 27 January 2003 OJ L 31/18; Council Directive 2005/85 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status, 1 December 2005, OJ L 326/13; European Parliament and EU Council Directive 2013/32 on common procedures for granting and withdrawing international protection (recast), 26 June 2013, OJ L 180/60.

<sup>114</sup> EU Parliament and Council Directive 2013/32 on common procedures for granting and withdrawing international protection (recast), 26 June 2013, OJ L 180/60, Art.14.

<sup>115</sup> *Supra*, Art.46.

prospect of removal is unlawful<sup>116</sup> and that return decisions shall provide for an appropriate period for voluntary departure of between seven and 30 days.<sup>117</sup> The Directive further established a maximum period of detention of an overall term of 18 months for a Third Country National who has been issued a removal order.<sup>118</sup> Although setting maximum time limits for detention and establishing minimum standards of removal or processing of asylum applications might be seen as a step towards migrants' protection, scholars noted that the Directive institutionalises detention as an ordinary means of enforcing removal of irregular migrants (Mitsilegas 2015: 93-97). This is in line with a semantic shift in the official language of EU legislation, within which after 2003 the term "irregular migrant" became a "common currency appearing again and again throughout documents, legislation and decisions" (Guild 2010: 17).

In 2009 the so called Employers Directive, providing for minimum standards on sanctions and measures against employers in relation to illegally staying Third Country Nationals, added an extra layer to the control of "illegal immigration".<sup>119</sup> As in the case of Carriers' sanctions, this legislation involved the private sector in migration control, traditionally a state activity, as part of a wide-ranging "privatisation of immigration control" within which private citizens are mobilised by the state to undertake tasks which would traditionally pertain to immigration control officers (Mitsilegas 2015: 23). While in the case of carriers the privatisation of immigration control pertained to the prevention of entry to the national territory, the introduction of criminal sanctions on employers extended the control inside the territory to cover both migrants who have illegally entered as well as over-stayers (Ibid: 54).

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<sup>116</sup> *Supra*, Art. 15 subsection 4.

<sup>117</sup> *Supra*, Art. 7 subsection 1.

<sup>118</sup> *Supra*, Art. 15 subsection 6.

<sup>119</sup> EU Parliament and Council Directive 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 18 June 2009, OJ L 168.

### *10. EU's need for labour migration and growing securitisation*

In the domain of labour migration each EU Member State has exclusive jurisdiction over quotas of migrants allowed in the country for work purposes, final decisions on migrant applications, procedures on long-term visas and requirements to acquire residence and work permits. Yet, over the 2000s the EU has issued a number of directives in an attempt to regulate non-EU labour migration. These include legislation on highly skilled workers such as the Blue Card and Intra-Corporate Transferees Directives,<sup>120</sup> as well as the isolated attempt to address low skilled workers through the Seasonal Workers Directive,<sup>121</sup> which awaits implementation by all Member States. These legal developments have been coupled with a reverse of the policy goal of “zero” labour migration which previously characterised the line of EU government. As Hansen pointed out, this shift took place in the late 1990s, as the Commission began to issue statements positing that the “zero immigration” target mentioned in past documents “was never realistic and never really justified”,<sup>122</sup> and “no longer appropriate”<sup>123</sup> based on economic and demographic analyses (Commission documents quoted in Hansen 2016: 7).

This shift in stance toward labour migration by the Commission is further reflected in documents such as the 2005 Policy Plan on Legal

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<sup>120</sup> European Council Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 25 May 2009, OJ L 155/17 and European Parliament and EU Council Directive 2014/66 on the conditions of entry and residence of third-country nationals in the framework of an Intra Corporate Transfer, 15 May 2014, OJ L 157.

<sup>121</sup> EU Parliament and Council Directive 2014/36 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, 26 February 2014, OJ L 94/375.

<sup>122</sup> EU Commission “Proposal for a Council Directive on the Right to Family Reunification”, 1 December 1999, 638 final.

<sup>123</sup> EU Commission “On a Community Immigration Policy”, 22 November 2000, 757 final.

Migration<sup>124</sup> and the Commission's 2012 Ageing Report<sup>125</sup>, where it is cautioned that unless the EU succeeds to increase labour migration, the EU's working age population will dramatically shrink with adverse consequences on its welfare systems (Hansen 2016: 6). Growth ten-plans such as Europe 2020<sup>126</sup> have further stressed the link between economic growth and migration growth (Ibid). Following a twisted logic, the increased regulation and call for more labour migration by the Commission have been paired in official documents by pledges for harsher measures against irregular immigration. According to Hansen, this has been "a tactic for saving face ... in the face of the broken promise for zero immigration" characterising EU policies in the 1990s (Hansen 2010: 95).<sup>127</sup>

This ambivalent stance at the EU level is to be seen in conjunction with the fact that national laws of Member States provide little to no channels for labour migration into Member States and national governments have not yet taken seriously the long-term policy advice of the Commission, perhaps also cognizant of the common reluctance of national publics to accept the notion of more openness towards more migration. As a result of this, for the time being the humanitarian category and the issue of security remain the predominant categories of management of EU migration. This is illustrated by the latest 2015 European Agenda on Migration.<sup>128</sup> On the one hand, the Agenda prioritises a view of migration in the EU in terms of humanitarian

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<sup>124</sup> EU Commission "Policy Plan on Legal Migration", 21 December 2005, 669 final.

<sup>125</sup> EU Commission "The 2012 Ageing Report: Economic and budgetary projections for the 27 EU Member States (2010–2060)", European Economy 2/2012, DG Economic and Financial Affairs.

<sup>126</sup> EU Commission "EUROPE 2020: A strategy for smart, sustainable and inclusive growth", 2 March 2010, 2020 final.

<sup>127</sup> Quoting the Commission's opinion, Hansen reports how measures implementing "the forced return of illegal residents," can "help to ensure public acceptance for more openness towards new legal immigrants against the background of more open admission policies particularly for labour migrants" (Hansen 2010: 95).

<sup>128</sup> EU Commission "A European Agenda on Migration", 13 May 2015, 240 final.

emergency and as a security matter, having as its core objective to take immediate action against “[t]he plights of thousands of migrants putting their lives in peril to cross the Mediterranean”.<sup>129</sup> On the other, it is nonetheless acknowledged towards the end of the document that a new policy on legal migration is needed and that crucially, “...without migration the EU's working age population will decline by 17.5 million in the next decade” thus, “[m]igration will increasingly be an important way to enhance the sustainability of our welfare system and to ensure sustainable growth of the EU economy”.<sup>130</sup> Although the issue remains a statement of purpose which is underdeveloped compared to other matters, the Commission appears to be consistently calling attention upon this issue which as we have seen is becoming more and more urgent as Europe’s working age population declines.

This brief historical overview has revealed that over the last fifty years or so the external borders of what is currently referred to as the European Union have significantly shifted through enlargements and EU integration. In the form of erasure of internal borders and the institution of the common market, EU integration further appears to have produced a strengthening of the EU’s external borders. This section has indeed illustrated a growing tendency of conceptualising migration, most specifically irregular migration, as a security matter in EU migration laws and policies. The next section carries the narration of borders forward by considering the different legal categories through which human mobility is framed by current legal frameworks on visas, residence, citizenship and asylum policies. In doing so, the rationales according to which the migrant population is divided into different statuses and degrees of legal affiliation in the EU will be made explicit and available for further discussion.

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<sup>129</sup> *Supra*, p. 2.

<sup>130</sup> *Supra*, p. 14.



### PART III. LEGAL CATEGORIES

Different legal categories of mobility relate to different degrees of citizenship rights and to the different ways in which populations are divided and governed. While legal categories of migration are a key governmental tool which impact on reality, they should not be considered as reflections of reality. As already mentioned in Chapter I, legal categorisations and different types of visas work as “economic, political and cultural filters” (Gaibazzi 2014, unpaged) and determine extremely different experiences of EU borders, which I suggested we consider on the same spectrum of governmentality. After succinctly discussing the case of EU citizens, who generally enjoy freedom of movement and residence across the EU, most of this section will examine the legal categories through which the mobility of Third Country Nationals is restricted and framed. The overview of the legal framework on visas, residence, citizenship and asylum policies in the EU will highlight that while for EU citizens nationality of a Member State generally stands as one main encompassing legal category enabling mobility and freedom of establishment across the EU, current legal categories framing the mobility of Third Country Nationals into the EU are oriented by criteria of economic worth or need of humanitarian protection. While these two main principles orient the frameworks of legal mobility into the EU, I will further note that unauthorised mobility or economic migration disguised as asylum seeking is criminalised in the EU context.

#### *11. EU citizens*

In Part I, I illustrated how EU integration progressively established EU citizenship as a legal status dependent upon national citizenship of a Member State which grants additional rights to EU citizens, among the

most important are freedom of movement and establishment in any Member State. The reason why EU internal borders are seen as erased is because currently EU citizens are generally entitled to move to other Member States to seek employment and establish themselves. While originally these rights were granted only to full-time workers, progressively they were extended to other categories such as students, workers with seasonal jobs, part-time employees or trainees in Member States, employees and self-employed persons, the unemployed, as well as their families. However, important exceptions still apply. As already posited in Section one, the freedom of establishment for EU citizens in another Member State remains conditional upon a financial means test, as the above discussion of the CJEU judgements showed. Another exception to free movement rights is embodied by the category of posted workers, i.e. employees posted to carry out a service in another EU Member State on a temporary basis. Different from other EU workers who go to another Member State to seek employment, their temporary presence in the host Member State means these migrants tend not to integrate in local labour markets and may be characterised by lower levels of social protection in comparison to local workers. According to EU law, even though posted workers are employed by the sending company and thus subjected to the labour law of their Member State of origin, they qualify for some basic rights in force in the host Member State.<sup>131</sup> In practice, however, posted workers have often become a form of social dumping, leading to the exploitation of differences among labour rights standards across EU Countries.<sup>132</sup>

As mentioned above, another provisional exception to the freedom of seeking work and establishment in any Member State pertained to the

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<sup>131</sup> European Parliament and Council Directive 96/71 the posting of workers in the framework of the provision of services, 16 December 1996, OJ L 18/1.

<sup>132</sup> Most recently, the EU Commission has been exploring avenues for reform of the legal framework regulating posted work of EU citizens.

nationals of “new” Member States as established by Accession Agreements, who are subjected to a nevertheless temporary, semi-citizenship status. It can be argued that on the whole, while internal borders have been generally erased for EU migrants and the membership of a Member State stands as one main encompassing legal category of mobility, exceptions to this rule persist and include citizens who do not pass the financial means test, as well as posted workers and some citizens from Member States of latest accession.

#### *12. Non-EU citizens: short stays*

While with the establishment of the Schengen area legal categories of mobility for EU citizens have progressively converged into one, various types of legal access are available to the nationals of Third Countries into and within the EU. Access can be mapped out from the perspective of the duration of the stay. Although visa requirements vary in each EU Member State, for short stay purposes (less than three months, for tourism, leisure or business) the conditions for issuing short-stay visas are regulated by minimum common requirements within the Schengen area. The 2006 Schengen Borders Code establishes common rules on external border checks on persons and provides that short stays within the Schengen zone should not exceed three months.<sup>133</sup> EU Countries’ short-term visa requirements discriminate among nationalities as well as low-income applicants (Guiraudon 2003:199). A 2001 Regulation stipulates lists of countries whose nationals do not need visas for short stay purposes (including North American countries, most South American countries, Australia and Japan) and a “black list” of countries whose

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<sup>133</sup> EU Council and EU Parliament Regulation No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 15 March 2006, OJ L 105, Art. 5. However, in current EU practice, tourist visas granted to Third Country citizens are strictly given only for the amount of days that a Third Country National plans to be in the Schengen area, the evidence of which is provided by the applicant’s travel booking at the moment of the application.

nationals need such a visa (all African countries and the majority of Asian countries).<sup>134</sup>

Moreover, demanding visa requirements may further prevent many categories of perspective applicants from obtaining a visa. The usual requirements for a short-term Schengen visa include a letter from the applicants' employer, evidence of sufficient financial resources for the duration of the travel, bank statements for the last 3 to 6 months, health insurance, booking of return ticket and proof of accommodation. The impossibility of fulfilling some of these requirements may impede the mobility of Third Country Nationals before they physically approach the EU external border as a visa is the main condition required to get on a means of transport to the EU (Guild 2007: 51). For stays longer than three months, a long-stay visa or residence permit (or both) is required and its conditions are differently regulated by Member States' national immigration law. However, a single residence permit and a single application procedure for issuing it exist at the EU level.<sup>135</sup> I now examine five main types of legal profiles connected with long stay: family member, worker, long-term resident, asylum seeker, irregular migrant.<sup>136</sup>

### *13. Family members*

Third Country Nationals who are immediate family members of an EU Member State citizen have a right to family reunification.<sup>137</sup> Nationals

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<sup>134</sup> EU Council Regulation 539/2001 listing the Third Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, 15 March 2001, OJ L 081, p.1.

<sup>135</sup> EU Council and Parliament Directive 2011/98/EU on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in a Member State, 13 December 2011, OJ L 343/1, Art.4, 6.

<sup>136</sup> See EU portal, <http://ec.europa.eu/immigration/tab2.do?subSec=11&language=7> en Accessed 25 April 2014.

<sup>137</sup> EU Council Directive 2003/86 on the right to family reunification, 2 September 2003, OJ L 251/12, Art.4.

of Third Countries who hold a residence permit valid for at least one year in a Member State and who have the option of long-term residence can apply for family reunification.<sup>138</sup> However, in several EU Countries, a permit granted on the basis of family reunification may not allow its holder to work (i.e. Belgium, Spain). As already mentioned, nationals of Third Countries who are long-term residents of a Member State are entitled to free movement to other EU Member States within the Schengen Area for a period of up to three months in any six-month period.<sup>139</sup> Such movement does not involve the right to long-term residence or work. After this period Third Country Nationals are required to return to the territory of their Member State of origin immediately.<sup>140</sup> On the contrary, Third Country family members of an EU citizen who moves to another Member State have the right to migrate with him/her.<sup>141</sup> The CJEU has further specified that this right is not conditional on the legality of entry or residence of the Third Country family member at the time of marriage.<sup>142</sup> In addition, when residing in an EU Member State other than their spouse's for a continuous period of five years, the right of permanent residence is extended to family members of EU Member State nationals.<sup>143</sup>

#### 14. *Workers*

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<sup>138</sup>Ibid, Art.3.

<sup>139</sup>EU Parliament and Council Regulation 265/2010 amending the Convention Implementing the Schengen Agreement and Regulation no. 562/2006 as regards movement of persons with a long-stay visa, 31 March 2010 OJ L 85, Art.1.

<sup>140</sup> EU Parliament and Council Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L 398/98, Art. 6 subsection 2.

<sup>141</sup>EU Parliament and Council Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 29 April 2004, OJ L 229/35, Art. 3 subsection 1.

<sup>142</sup> ECJ Case C-127/08 *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* ECR I-6241.

<sup>143</sup> EU Parliament and Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 30 April 2004 OJ L 158/77, Art. 16.

The entry into any EU State for non-EU citizens with the purpose of residence is normally dependent on the existence of a residence permit for work purposes in all EU countries' national legal frameworks. This permit rests on the backing of a future employer in all EU countries' national legislation (Faure Atger 2011: 158). In most EU national immigration frameworks employers are the ones required to initiate the administrative procedures and usually their intercession is needed before a prospective labour migrant can apply for a visa. Accordingly, not only the employer is invested by the state with the power of undertaking checks over access to EU Member States' territory, the law also places the employer in a controlling relationship in respect to his/her Third Country employee, as the validity of the residence permit of this employee is reliant upon the continuity of his/her labour contract (Ibid). This process further implies that a prospective labour migrant should have found employment before entering the EU, and very few individuals manage to enter the EU through this category, as will be seen in the Italian case.

EU law intervenes in several ways within national frameworks of non-EU labourers' recruitment. For example, in all EU Member States the salary offered to a Third Country national should be at least the minimum of the national standard for that occupation. The latter principle is a positive governmental action to promote the welfare of migrant workers. At the same time, EU law endorses the principle of community preference, according to which before admitting a Third Country worker, Member States must prove that vacancies cannot be filled by national or EU workers.<sup>144</sup> In some EU countries employers

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<sup>144</sup> The principle of "community preference" states that: "Member States will consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower resident on a permanent basis in that Member State and already forming part of that Member State's regular

have to undertake this assessment of the market themselves and demonstrate that the vacancy cannot be occupied by any national or EU country worker (e.g. in the UK), while in others the encumbrance of proof is on the state (e.g. Germany). EU borders further filter Third Country Nationals according to their qualifications and skills.

The Blue Card Directive has introduced a two-year work permit ("Blue card") for high-skilled workers who are nationals of Third Countries. Attached to it is a series of additional rights such as family reunification and freedom of movement within the EU.<sup>145</sup> In order to be granted a blue card, a Third Country National needs to have an employment contract or job offer of at least one year in any EU Member State. After two years of employment, the blue card can be renewed if the contract subsists. After three months of unemployment the card shall be cancelled. The holder of a blue card is entitled to equal treatment to nationals regarding: working conditions, freedom of association, education, training and recognition of qualifications, access to social security and pensions, access to goods and services made available to the public, information and counselling services.<sup>146</sup> Remarkably, the implementation of this EU-wide scheme in its first two years has been highly sporadic as only 16,000 blue cards were issued, 13,000 of which in Germany.<sup>147</sup>

The favourable conditions for border crossing and residence in the EU granted to high-skilled labour migrants do not apply to low-skilled prospective migrant workers, who are generally precluded by national

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labour market", Green Paper on an EU approach to managing economic migration [COM (2004)] 811, 11 January 2005.

<sup>145</sup> EU Council Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 25 May 2009, OJ L 155/17, Art. 15, 18-19.

<sup>146</sup> EU Council Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 25 May 2009, OJ L 155/17, Art. 14.

<sup>147</sup> *Supra*, footnote 68.

legislation through the criteria of skills fulfilment mentioned above: labour market test (fall within the needed quotas), wage (admitting only those paid over a certain wage). A 2014 Directive on Seasonal Workers has been adopted to tackle the issue,<sup>148</sup> the impact of which remains to be seen.<sup>149</sup> As legal routes into European countries are only available to affluent or hyper-skilled individuals, most prospective migrants are left with the only option of irregular routes and irregular work. The absence of legal routes to enter the EU for most non-EU migrant workers provides EU national labour markets with readily exploitable and cheap labour. The latter has become “a structural necessity” for Member States, which has been produced by the neoliberal shift within the EU’s social relations and political economies that have taken place in the last decades (Hansen 2010: 90). In spite of the Commission statements in favour of more labour migration mentioned above, the logic emerging from the existing EU legal framework on external borders is that high-skilled or well-off migrants are desirable and do not represent a threat to EU national societies or economies. On the contrary, although equally important and contributing to host economies, poor or low-skilled migrants are depicted as highly undesirable and profiled as high-risk applicants (Guild 2011: 217-218).

Third Country Nationals’ social rights such as access to healthcare, social security and education are managed at a national level within the EU and differ in each Member State. In most Member States welfare benefits are related to legal employment or residence, the length of the residence, contributions paid or nationality of the individual. Short-term visa holders are not entitled to welfare benefits and, as already mentioned, normally need to show evidence of health care insurance when applying for visas. In almost all Member States the nationals of

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<sup>148</sup> *Supra*, footnote 121.

<sup>149</sup> At the time of writing, it has not been implemented into national legislation by most EU Member States.



Third Countries with long term legal residence are entitled to social security benefits and social assistance (Groenendijk et al. 2000: 105). In some Member States nationals of Third Countries in irregular situations have the right to free primary and secondary healthcare (Belgium, Italy, France, Netherlands, Portugal, Spain, UK),<sup>150</sup> as well as free education for their children (e.g. Belgium, Italy, France, Netherlands, Ireland, UK, Spain).

#### *15. Long term residents and citizenship acquisition*

EU legislation entitles Third Country Nationals conceived as long term residents to obtain long term residence after five years, conditional upon EU Member States' integration requirements and a term of living lawfully and continuously in a Member State.<sup>151</sup> Although not regulated at the EU level, a number of European countries implement investor residence programs granting permanent residence and even citizenship for migrants investing in government-approved real estate, government bonds or national economic funds. Upon conditions of meeting a minimum investment threshold,<sup>152</sup> permanent residency by investment may be obtained (Hungary, Bulgaria, Portugal, Cyprus and the United Kingdom),<sup>153</sup> and in some countries even citizenship (Malta, Cyprus, Bulgaria).<sup>154</sup> Permanent residence and citizenship by investment are a key

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<sup>150</sup> See <http://fra.europa.eu/en/theme/asylum-migration-borders/healthcare-entitlements> Accessed 19 May 2016

<sup>151</sup> EU Council Directive 2003/109 concerning the status of third-country nationals who are long-term residents, 25 November 2003, OJ L 16/44, Art. 4.

<sup>152</sup> The threshold can range from a minimum of 300,000 Euros for Hungarian residency to a minimum of 2 billion Pound Sterling for British residency. See <https://www.artoncapital.com/residency-by-investment/> Accessed 20 February 2016

<sup>153</sup> See <https://www.artoncapital.com/residency-by-investment/> Accessed 20 February 2017

<sup>154</sup> In 2014 the Maltese government introduced a scheme granting Maltese citizenship to purchasers of real estate for €650,000. This case provoked controversies at the EU level as according to this scheme, applicants do not have to reside in Malta to obtain it and can obtain citizenship after only six months of "due diligence". EU institutions attacked the Malta passport scheme, EU Observer.com, 16 January 2014 <http://euobserver.com/justice/122744> Accessed 16 January 2014.

example of how Member States openly capitalize on migration by trading off citizenship rights in exchange for migrant investors' capital.

Traditional routes to citizenship acquisition instead take longer periods of time and vary greatly across the EU. To be precise, there exist 28 different ways of defining citizenship, of acquiring and losing it in the EU (Mantu 2011: 232). The majority of Member States allows double nationality.<sup>155</sup> With the exception of France, which grants nationality on the basis of *jus soli*. Among EU countries' national laws, the most common way to gain citizenship at birth is through family relations with a national (*jus sanguinis*). In several EU Member States the line between *jus soli* and *jus sanguinis* is currently blurred as the law requires at least one of the parents to be a legal permanent resident of the territory of the state in question at the child's birth. Citizenship of an EU Member State can be further obtained through marriage combined with some years of residence in the country. Finally, citizenship can be acquired through naturalisation, which requires a number of years of continuous legal residence in an EU Member State, normally combined with other conditions, such as knowledge of the national language.<sup>156</sup> Sometimes substantive citizenship criteria and tests are also needed to acquire long-term resident status, such as in the Netherlands and in the United Kingdom (Ibid: 137).

#### 16. *Asylum seekers*

As already mentioned, a key category through which the mobility of Third Country Nationals across the external borders of the EU is framed is that of the asylum seeker. Since 1997, the reception of asylum seekers is regulated by the Dublin system, which establishes that Third Country

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<sup>155</sup> Exception made for Austria, Czech Republic, Denmark, Estonia, Germany, Lithuania and Slovakia who only allow one nationality.

<sup>156</sup> See <http://eudo-citizenship.eu/country-profiles> Accessed 15 June 2014.

Nationals fleeing from prosecution entering the territory of the Union without a valid visa must apply for asylum in the first EU Member State reached and should be returned to it for their asylum claims should they travel to another EU Member State.<sup>157</sup> The Dublin system limits the number of claims for asylum that an individual can make to one Member State and sets up a system to allocate the responsibility for asylum applicants among Member States. In 2003, this system was amended and incorporated within EU legislation with the Dublin Regulation, which was last revised in 2013.<sup>158</sup> Double applications are tracked through the cross checking of the EURODAC system, which registers fingerprints and other data of asylum applicants when they first arrive in an EU Member State.<sup>159</sup>

In prescribing that asylum seekers entering the territory of the Union without a valid visa ought to apply for asylum in the first EU country they reach and should be returned there should they move on, the system de facto rules where an asylum seeker/refugee should claim asylum and, if international protection is granted, where she ought to live and work. This injunction makes EU internal borders extremely significant for

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<sup>157</sup> Signed in 1990, the Dublin Convention came into force in 1997 with the aim of harmonising European policies on asylum, to grant refugees adequate protection in accordance with the 1951 Geneva Convention and the 1967 New York Protocol. The Dublin Convention came into force in 1997 for twelve signing countries (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom), and later on for others (Austria, Sweden, Finland). See Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 18 August 1997, OJ No. C 254/1.

<sup>158</sup> EU Parliament and Council Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L180/31.

<sup>159</sup> EURODAC is a database system set up in 2000 to assist European Member States in the identification of asylum applicants and persons who have already been apprehended in connection with an irregular crossing of an external border of the Union. See EU Council Regulation 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, 11 December 2000, OJ L 316/1.

asylum seekers and refugees because Member States are characterised by very different levels of reception capacities and protection for asylum seekers as well as different acceptance rates of refugee status. For example, in 2014 Sweden accepted 76.6% of all asylum requests while Hungary granted refugee status only to 9.4% of the total percentage of its asylum seekers.<sup>160</sup> This system has also been complicated by the fact that countries such as the UK, Ireland and Denmark have different arrangements under which they can opportunistically select the legislation they want to be bound by (El-Enany 2017b). The first country of arrival rule has notably ended up concentrating the vast number of asylum seekers in the processing centres of those EU Member States easily reachable by sea or land, such as Greece and Italy. It has further created a paradoxical situation. On the one hand, asylum seekers arriving at the borders who would want to reach Northern European countries are unable to do so; on the other, Southern countries are forced to register and host asylum seekers even when they do not necessarily have the economic capacity to do so. As a result, many migrants who reach the borders of Southern Europe try and escape fingerprinting procedures and reach their preferred country of destination, often with the collusion of Southern Member States. In 2015, this practice prompted the re-establishment of borders controls and the construction of fences along the internal borders of several EU Countries despite the Schengen Agreement, as a response by some Member States to what was described as a “migrant crisis” in the EU space.<sup>161</sup>

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<sup>160</sup> Daily chart: Europe's migrant acceptance rates, *The Economist*, 1 September 2015, <http://www.economist.com/blogs/graphicdetail/2015/09/daily-chart> Accessed 30 May 2016

<sup>161</sup> These developments, revamping the protracted dispute between Southern EU Countries (who push to abolish the first-country of arrival rule) and Northern EU Countries (generally against radical changes to this system) have recently prompted the EU Commission to formulate proposals to reform the system. See Migrant crisis: European Commission proposes asylum reforms, BBC, 6 April 2016 <http://www.bbc.com/news/world-europe-35974982> Accessed 30 May 2016

The imbalance in the Dublin system and its potential human rights violations has been highlighted in some recent judgments by the European Court of Human Rights (ECHR)<sup>162</sup> and the CJEU. In *MSS v Belgium and Greece*, the ECHR ruled that the removal of an asylum seeker from Belgium to Greece under the Dublin system had resulted in a violation of a number of basic human rights by Belgium and Greece.<sup>163</sup> This principle was further reiterated by the Court of Justice of the European Union in the *NS* judgment where it was held that an asylum seeker cannot be returned to a country where there is a serious risk that her rights under the EU Charter of Fundamental Rights will be violated due to systematic deficiencies in the asylum system.<sup>164</sup> Mitsilegas has posited that rulings such as *MSS* and *NS* by the European Court of Human Rights and the Court of Justice of the European Union have provided important limitations to the relentless criminalisation of migration in the EU (Mitsilegas 2015: 109-110). For Mitsilegas, these cases highlight the “transformative power of the European judiciary” in the upholding of the human rights of migrants and their decriminalisation (Ibid: 110). Nevertheless, an investigation by Dembour of the human rights of migrants at the European Court of Human Rights in less known decisions, including inadmissibility decisions and rulings of non-violation reveals instead how heavily migrants remain discriminated

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<sup>162</sup> The European Court for Human Rights (ECHR) was instituted in 1959 by the European Convention on Human Rights. It has jurisdiction on all 47 Members of the Council of Europe.

<sup>163</sup> ECHR, App. No. 30696/09, *MSS v Belgium and Greece* [2011]. *MSS* was an Afghan asylum seeker who first arrived in Greece but claimed asylum in Belgium. He was thus returned to Greece pursuant to the Dublin Regulation. Once in Greece, the applicant was initially detained in degrading conditions. He was then released, while waiting for the decision on his application, and left homeless, not permitted to work and without access to financial resources. For the first time, the Court held that Member States failure to meet basic socio-economic needs constitutes a violation of Article 3 of the ECHR. The Court also importantly stated that Member States can be held accountable for returning asylum seekers to face situations that result in a violation of Article 3.

<sup>164</sup> CJEU, C-411/10, *N.S. v. Secretary of State for the Home Department* and CJEU C-493/10, *M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011. The cases deal with Afghan asylum seekers' refusal to comply with the decision by UK authorities to be returned to Greece pursuant to the Dublin Regulation.

against on the grounds of their nationality in ECHR judgements (Dembour 2015). For Dembour, the problem of discrimination on the grounds of nationality, which shows a bias in favour of the state rather than migrants, remains at the core of ECHR migrant case law (Ibid: 505).<sup>165</sup>

Current media and political debates at the national and EU level often turn on the question of whether asylum seekers are truly asylum seekers or economic migrants in disguise. As I already noted in Chapter I, insofar as legal categories are simplifications of the social reality and used instrumentally by both governments and migrants, distinctions between ‘refugee’, ‘asylum seeker’ and ‘migrant’ are by definition malleable and subject to interpretation. In the current EU context, they are also at risk of supporting the idea “that some migrants are worthy of humanisation, while others are not” (El-Enany 2017: 2).

The distinction between bogus and “true” refugee has been increasingly related to a rhetoric of humanitarian assistance to those in need (Walters 2011: 146). Humanitarian concerns are problematic because they turn migrants into objects of compassion and thus inferior subjects (Cuttitta 2015: 132). This phenomenon possibly enforces mechanisms based on the asymmetry between saviours on the one hand and victims on the other, denying agency and equal status to the victims.<sup>166</sup> While humanitarian assistance is given to victims, “bogus” asylum seekers or economic migrants are criminalised and viewed as opportunistic and undesirable individuals. This phenomenon is

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<sup>165</sup> Dembour assesses migrants’ rulings at ECHR having the Inter - American Court of Human Rights as counterpoint. Showing a markedly “pro-migrant” approach, the joint consideration of migrant jurisprudence of the Inter - American Court of Human Rights demonstrates that a pro-state bias is not a necessary feature of all human rights courts (Ibid: 7).

<sup>166</sup> The saviours/victims asymmetry dangerously evokes old colonial patterns, whereby “magnanimous” Europeans – whose ancestor once migrated to countries of the global South to colonise and loot their lands - welcome victimised, inferior people in their countries as an act of good will.

intertwined with the securitisation of borders: for humanitarian concerns also increasingly mingle with borders' reinforcement in the name of protection of human rights of migrants from their smugglers (Ibid). The paradoxical outcome of this binary is that border management has often resulted in depriving migrants of their very lives (Ibid).

More generally, humanitarian concerns obfuscate the fact that humanitarian "emergences" are but a product of legal and policy frameworks which do not foresee legal channels for economic migration (unless it entails big investments or skills which cannot be found among EU citizens). As any legal access to economic migration has been closed, migrants are left with the only possibility of presenting themselves as asylum seekers. In other words, humanitarian protection is turned by this lack of access into a straightjacket which at the same time deprives them of freedom of movement. Third Country Nationals can only be considered as legitimate individuals at the price of presenting themselves as victims, or be criminalised as irregulars (Ricciardi 2017, unpagged). This consideration brings us to the last category within which the mobility of Third Country migrants to the EU is framed: the irregular migrant.

### *17. Irregular migrants*

As already mentioned in Chapter I, the notion of irregular migrant is a legal category insofar as all definitions of it are commonly defined against the benchmark of migration law. The benchmark may change in time and space. It was noted earlier in this chapter how progressive enlargements have changed the status of some of the residents in EU Member States from an irregular migrant status to EU citizens. Moreover, Third Country Nationals could be legally residing in an EU Member State but may be illegally working in another. The impossibility of identifying an objective and fixed category of irregular migration is also evident in the recurrence

of amnesties regularising illegal migrants in many EU Countries.<sup>167</sup> As will be seen from a close inspection of the Italian case, despite their allegedly exceptional character, amnesties have been a regular tool of migration policy in Southern European countries (Colombo 2012: 353). Despite not having resorted as often to this measure, over the same timeframe Central and Northern European Countries such as the UK and Sweden have regularised comparable numbers of irregular migrants through asylum policies (Ibid).

Not only is the notion of illegal migration subject to a timeframe which may shift in content following policy and legal changes, but the notion of legal/illegal migration is also subject to a limited time-frame for individuals, as can be observed in the case of visa over-stayers. Remarkably, while policy-makers at the national and European level habitually focus on illegal border crossings, 75% of unlawful migration flows in the EU consist of people entering legally and overstaying their visas (Bigo 2011: 300). The connection between illegal migration and illegal border crossing is easier to mobilise public opinion around and draws on traditionally territorial notions of borders which are deeply engraved in national collective imaginations. As noted in Chapter I, the notion of “illegal” migration has been key to the process of securitisation of migration which has characterised the EU over the last decades. From a situation of administrative noncompliance, irregular migration has been gradually transformed by political discourse and legal frameworks into a criminal act in the law of many Member States (e.g. Italy), sanctioned with detention for the purposes of removal, as mentioned above. Despite the stated commitment to the international human rights legal order, the securitisation of migration promoted in EU law contradicts this. As some have noted, most recently the management of migrant illegality has

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<sup>167</sup> The introduction of occasional amnesties regularising illegal migrants has characterised the migration policies of the majority of European countries and especially Mediterranean countries (Portugal, Spain, Italy and Greece) since the 1970s.



become a productive business for Member States, employing hundreds of thousands of workers to implement measures such as preventive operations, search and rescue operations, processing centres, and detention centres (Andersson 2014: 274).

This section has discussed the main categories through which the mobility of the population is framed into different segments in contemporary Europe. Even though it is often suggested that external borders have been strengthened for all non-EU citizens, this section highlighted how border controls and legal categories of migration differ according to a number of criteria. It could be posited that the criteria according to which these lines are drawn are however rather straightforward: they include nationality of provenance, blood ties and most importantly, economic worth. The latter does not only define a migrant's desirability but also, the availability of economic resources is the basis on which segments of the non-EU population are considered dangerous or desirable. As observed at the beginning of the section, the existence of sufficient economic resources remain in place also as the ultimate test for economically inactive EU citizens. The category of "illegal migration" was further discussed as a key category in the current processes of securitisation of migration. In order to buttress my analysis with more detail of how this securitisation has taken place, the next section examines this processes in one national case, Italy.

#### PART IV. EU BORDERS CLOSE UP: ITALY

##### *18. Historical outline*

Owing to its peninsular "gate-keeper" position sharing sea borders with Third Countries, Italy is a particularly interesting viewpoint from which to analyse the management of the external EU borders. This

section will offer an historical outline of Italy's immigration legislation. It will then analyse the main legal categories of migration for non-EU citizens in the Italian context. As the large presence of generations of Italians in the Americas, Australia and other European countries testifies, Italy has traditionally been a country of emigration. However, over the last thirty years Italy has become a migrant-receiving country and is currently among the top-three Member States with the largest number of immigrants.<sup>168</sup> Given the small presence of foreigners residing and working in Italy, until the 1980s Italy did not have any specific immigration legal framework and immigration matters were regulated by a 1931 decree on public security.<sup>169</sup> In such circumstances, most issues regarding foreigners' residence and employment were under the administrative discretion of ministerial memoranda. A 1977 ruling by Italy's Constitutional Court first pronounced the obsolescence of the established practice of handling immigration and advocated for the development of a comprehensive legal framework regulating the entry and residence of foreigners in Italy.<sup>170</sup> In the 1970s, out of a population of over 50 million, foreign citizens were still less than 300,000, one-third of whom were nationals from other European Economic Community (EEC) countries. In the 1980s the presence of foreigners increased, reaching 450,000 regular migrants in 1986.<sup>171</sup>

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<sup>168</sup> As of 2013 there were 4.6 million immigrants regularly residing in Italy, making out 7.4% of Italy's population. One in three immigrants in Italy was a national of another EU Member State (Caritas/Migrantes 2013: 9).

<sup>169</sup> Regio Decreto (*Royal decree*) n. 773, 18 June 1931, Art. 142-152.

<sup>170</sup> Corte Costituzionale (*Constitutional Court*), ruling n. 46, 20 January 1977.

<sup>171</sup> Caritas and Migrantes, XXIII Rapporto Immigrazione 2013: Tra crisi e diritti umani (XXIII Immigration report: amid crisis and human rights), p. 16 <http://www.caritas.it/caritasitaliana/allegati/3960/SintesiRapportoImmigrazione.pdf> Accessed 25 April 2015

The so called “Foschi law” introduced an immigration legislative framework for the first time in Italian history in 1987.<sup>172</sup> The law envisaged that the entry of foreigners for work purposes ought to go through monthly surveys, verifying beforehand the shortage of Italian workers who could occupy that post.<sup>173</sup> However, this mechanism being too complex was never properly implemented. The law also approved the first of many amnesties (*sanatorie*) for migrant workers irregularly residing in the country, giving them the possibility of coming forward and obtaining legal status.<sup>174</sup> The migration legal framework shifted again in 1990 with the “Martelli law”<sup>175</sup> which addressed the lack of regulations on entry and residence of nationals from outside the EEC (“extra-communitarian” citizens), which had been left out in the Foschi law. In those years, the denomination of “extra-communitarian” (*extracomunitari*) began to be used in legislation and mass media language to define non-EU countries’ migrants.<sup>176</sup> The Martelli law introduced measures to deal with refugees and asylum seekers, provisions regulating the entry and residence of Third Country Nationals and residence permits.<sup>177</sup> The law endorsed another amnesty for those foreigners who could demonstrate their presence in Italy by 1990, irrespective of their work status.<sup>178</sup> The

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<sup>172</sup> Norme in Materia di Collocamento e di Trattamento dei Lavoratori Extracomunitari Immigrati e Contro le Immigrazioni Clandestine (*Regulations on Placement and Treatment of non-EU immigrant Workers and Against Irregular Migration*), Law n. 943 of 12 January 1987. The law was named after Franco Foschi, the member of Parliament who worked towards this law’s endorsement.

<sup>173</sup> *Supra*, Art.5-7.

<sup>174</sup> *Supra*, Art.16-19.

<sup>175</sup> Norme Urgenti in Materia di Asilo Politico, di Ingresso e Soggiorno dei Cittadini Extracomunitari e di Regularizzazione dei Cittadini Extracomunitari ed Apolidi già Presenti nel Territorio dello Stato (*Urgent Provisions regarding Political Asylum, Entry and Residence of Extra-communitarian Citizens and Stateless Already Present on State’s Territory*) Law No.39, 28 February 1990. The law is commonly identified after the name of the Deputy Prime Minister who pushed for its promulgation, Claudio Martelli.

<sup>176</sup> This denomination generally indicates non-EU migrants from developing countries rather than extra-communitarians from developed countries such as Switzerland or the United States and often retains a negative connotation in the Italian language.

<sup>177</sup> *Supra*, footnote 175, Art.1, 4.

<sup>178</sup> *Supra*, Art.9.

law further instituted the practice of yearly planning of migratory flows through ministerial decrees (*decreti flussi*), aimed at meeting Italy's labour demand.<sup>179</sup> Finally, the Martelli law introduced for the first time the notion of detention and pecuniary sanctions for irregular migrants in blackletter law.<sup>180</sup> As of 1991 an estimated 47% of the total number of foreign nationals in Italy did not hold regular status.<sup>181</sup> After a 1995 legislative decree implemented another regularization of irregular migrants already working in the country,<sup>182</sup> in 1998 the "Turco-Napolitano law" substantially extended the governmental reach of Italy's borders towards Third Country Nationals.<sup>183</sup> In the same year, the total number of international migrants in the country had reached one million.<sup>184</sup>

The Turco-Napolitano law made the entry of Third Country Nationals conditional upon the existence of an employer sponsoring Third Country migrants for the entire duration of his or her residence. Its governmental purpose was to achieve an equilibrium between migratory flows and the variable needs of the job market. Similarly to the previous laws, it reiterated the notion of migration as a phenomenon which needs to be governed through planning. This law provided for a triennial planning of migratory flows, although applied by annual decrees, to be issued by the Presidency of the Council of Ministers.<sup>185</sup> This law further introduced the practice of administrative detention for irregular migrants by instituting

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<sup>179</sup> *Supra*, Art.2 subsections 2-3.

<sup>180</sup> *Supra*, Art.7.

<sup>181</sup> Fondazione ISMU - Istituto per lo Studio della Multiethnicità (*ISMU Foundation - Institute for Multiethnic studies*) <http://www.ismu.org/irregolari-presenze/> Accessed 12 December 2014.

<sup>182</sup> Decreto Legge (*Legislative decree*) n. 489, 18 November 1995.

<sup>183</sup> Norme in Materia di Collocamento e di Trattamento dei Lavoratori Extracomunitari Immigrati e Contro le Immigrazioni Clandestine (*Provisions Concerning Immigration and the Condition of Third Country Nationals*) Law n. 40, 12 March 1998. The law is named after the then Minister for Social Affairs, Livia Turco and the then Home Secretary, Giorgio Napolitano.

<sup>184</sup> *Supra*, footnote 171, p.20.

<sup>185</sup> *Supra*, footnote 183, Art.3.

“centres for temporary stay” (*centri di permanenza temporanea*) for the detention of irregular migrants facing removal.<sup>186</sup> Procedures for the deportation of illegal immigrants were also implemented. A few months after its enactment, the Turco-Napolitano law was merged with previous relevant legislation into an *Immigration Act* incorporating all the existing legislation on the subject of immigration.<sup>187</sup>

The legal framework of Italy’s borders was amended once again in 2002 by the “Bossi-Fini law”<sup>188</sup> which represents a clear shift towards a criminalisation of migration. The law removed the employer sponsoring system introduced in 1998 and prescribed the conditionality of the entry of Third Country Nationals for work purposes on the existence of a “residence contract” (*contratto di soggiorno*), signed between an employer (a firm or a family) and the migrant worker.<sup>189</sup> In addition the law stipulated more severe measures to tackle irregular migration: for example, it made those who did not comply with an expulsion order liable to detention (this was set aside by the jurisprudence of the CJEU in 2011).<sup>190</sup> The law also established a 60-day maximum length for administrative detention and detention between six months and a year or deportation in case of failure to comply with police orders.<sup>191</sup> Remarkably, at the same time the law included another amnesty for irregular immigrants already in Italy,

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<sup>186</sup> *Supra*, Art.12.

<sup>187</sup> Testo Unico delle Disposizioni Concernenti la Disciplina dell’immigrazione e Norme Sulla Condizione Dello Straniero (*Consolidated Immigration Act regarding the Field of Immigration and Provisions on Foreigners’ Condition*), Legislative Decree n. 286, 18 August 1998.

<sup>188</sup> Modifica alla normativa in materia di immigrazione e di asilo (*Changes to the Provisions Pertaining to Immigration and Asylum*), Law n. 199, 26 August 2002. The law was named after Umberto Bossi, then Minister for Institutional Reforms and Devolution and Gianfranco Fini, the then Vice-President of the Council of Ministers.

<sup>189</sup> *Supra*, Art.5. This rule does not apply to highly-skilled workers, entitled to entry independently from migration flows quotas.

<sup>190</sup> Case C61/11 PPU Hassen El Dridi alias Soufi Karim (2011) ECR I-03015, ruled that this article violates the European Parliament and EU Council Directive 2008/115/ on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 398/98. This instance has been substituted by a similar law but is now punished with pecuniary sanctions.

<sup>191</sup> *Supra*, footnote 188, Art.5 subsection 4.

allowing those who had worked and lived in Italy for at least three months to be regularised.<sup>192</sup> The criminalisation of migration in Italy's legal framework was furthered by the so called 2008 "Security Package" (*Pacchetto Sicurezza*).<sup>193</sup> The latter transformed Third Countries Nationals' illegal entry and/or illegal residence within Italian territory into an aggravating circumstance for criminal offences.<sup>194</sup> In doing so, the law turned the illegal presence of foreigners on Italian territory – an administrative condition determined by law – into a criminal offence.<sup>195</sup> The same law extended the maximum period of detention of irregular migrants from one to six months.<sup>196</sup>

In the same years the government signed an Italy-Libya Friendship Pact to curb boat migration.<sup>197</sup> This initiated a push-back policy which entailed the interception of boat migrants on the high seas, considered outside the national territory, and their push back before they reached Italy's territorial waters. This situation was denounced by the landmark *Hirsi v. Italy* ruling<sup>198</sup> of the European Court of Human Rights. Despite the predominantly territorial interpretation of national sovereignty set out in previous ECHR case law, the ruling in *Hirsi* acknowledges that in

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<sup>192</sup> *Supra*, Art.33.

<sup>193</sup> Disposizioni in Materia di Sicurezza Pubblica (*Provisions on the Subject of Public Security*), Law n. 94, 24 July 2008.

<sup>194</sup> *Supra*, Art. 1 subsection 1 f).

<sup>195</sup> *Supra*, Art.4 subsection 48.

<sup>196</sup> *Supra*, Art.15 subsection 5.

<sup>197</sup> Treaty on Friendship, Partnership and Cooperation between Italy and Libya, 2 March 2009.

<sup>198</sup> *Hirsi Jamaa and others v. Italy* (Application no. 27765/09) ECHR, 23 February 2012

*Hirsi* and the other 23 applicants were among a group of 200 Eritrean and Somali migrants who, having tried to sail from Libya to Italy, were intercepted by the Italian authorities on the high seas off the island of Lampedusa and immediately returned to Libya under the framework of the abovementioned Pact. Given the political situation in their countries of origin, the applicants would have been entitled to apply for political asylum. In fact some of them already enjoyed the status of political refugee. However, the applicants submitted that they were sent back to Libya by the Italian authorities without the possibility of exercising this right. While the exercise of the right of seeking asylum is imperative on Italian territories, the applicants also alleged that they could not exercise this right as they were intercepted on the high seas and rejected without any identification.

exceptional circumstances such as interceptions of boat migrants on the high seas, Italy's actions produced effects outside of its territorial borders which constituted an exercise of sovereign jurisdiction.<sup>199</sup> Interestingly, while at the time of the events the Italian government claimed success over reducing the number of boat migrants landing on Italian coasts, the numbers of irregular migrants in the country had in fact risen (as the majority of them did not enter the country by boat, but rather became irregular upon expiration of a visa).<sup>200</sup>

Following the ruling in *Hirsi* and other tragic events, such as the drowning of 662 boat migrants off the coasts of Lampedusa on October 2013, the policy was suspended and Italy adopted a stance of search and rescue operations in border controls in the following years. The launch of “Mare Nostrum”, a large-scale search and rescue humanitarian operation fully managed by the Italian navy marked the beginning of a distinctly humanitarian approach to border management.<sup>201</sup> This approach is further reflected in a change of register in borders management, whereby boat migrants are no longer “intercepted” but instead “rescued” (Cutitta 2014: 26). This compassionate and allegedly more humane approach is observable in the case of the aforementioned migrant shipwreck in Lampedusa. On such occasion, the Italian government declared a national day of mourning, and the then Prime Minister Letta stated that

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<sup>199</sup> This notion was also acknowledged by the ECHR in the judgement of *Al-Skeini and others v. the United Kingdom* (Application no. 55721/07), 7 July 2011.

<sup>200</sup> Paleologo, V. “Diritti sotto sequestro – Prima e dopo la sentenza sul caso *Hirsi* ed altri” (*Rights under seizure- Before and after the Hirsi Case*) 27 Febbraio 2012, progetto Melting Pot Europa, <http://www.meltingpot.org/Diritti-sotto-sequestro-Prima-e-dopo-la-sentenza-sul-caso.html> Accessed 20 July 2013.

<sup>201</sup> Within one year, as of October 2014, Mare Nostrum had saved 100,250 people and as a result Italy's work was praised as “heroic” by the International Organisation for Migration (IOM). The policy framework of Italy's sea borders however changed again in November 2014 when Mare Nostrum was substituted by FRONTEX operation Triton, with a budget of one third of the latter and a smaller range of operations.

the victims of the tragedy would from now on be Italian citizens.<sup>202</sup> While on the surface such gestures might appear to re-evaluate migrants and their lives, they are oblivious of the fact that migrants' lives are at risk precisely due to the restrictive border policies which continue to threaten their very lives. Paradoxically, the human life of boat migrants is valued only "after it has been devaluated by restrictive border policies", in other words, while boat migrants earn compassion when they lose or risk their lives, they are instead investigated for illegal immigration when they make it to mainland Italy (Cuttitta 2015: 130).

Despite the overall tendency to securitise migration, the government's position towards irregular migration has gone through periods of opening and closure. In 2011, a legislative decree implementing two EU directives further extended the maximum detention period for irregular migrants from six months to 18.<sup>203</sup> This maximum period of detention was decreased to three months in 2014.<sup>204</sup> The aggravating circumstance of irregular immigration introduced in 2009 was reverted from a criminal offence to an administrative offence in 2014.<sup>205</sup> In 2013, due to repeated amnesties and EU enlargements transforming the status of many irregulars into legal residents, the percentage of irregular Third Country Nationals in Italy accounted for 6 percent of the total migrant population.<sup>206</sup> While the securitisation of migration can be described as an

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<sup>202</sup> "Ecatombe a Lampedusa" (*Catastrophe in Lampedusa*) 4 October 2013, Quotidiano net <http://qn.quotidiano.net/cronaca/2013/10/04/960216-lampedusa-migranti-barcone-morti.shtml>

Accessed 1 July 2017

<sup>203</sup> Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari (*Urgent provisions implementing directive 2004/38/EC on the free movement of EU citizens and directive 2008/115/EC on the return of irregular third-country nationals*), 23 June 2011, Decree No. 89/2011, Art.3.

<sup>204</sup> Law n. 161, 25 November 2014.

<sup>205</sup> Law n. 67, 2 May 2014.

<sup>206</sup> *Supra*, footnote 181.



overall general tendency in Italian law in the long term, more lenient or stricter policies also occur in cycles.

### 19. *Legal categories of migration*

Italian law governs its non-EU migrant population through a variety of legal categories. For stays longer than three months, non-EU nationals need to apply for a residence permit within eight days of arrival.<sup>207</sup> The length of the residence permit is the same as the long term visa: up to nine months for seasonal work, one year for attending a course of study or professional training and up to two years for work. As far as labour migration is concerned, as already mentioned, employers are required to initiate the procedure and apply to a Single Desk for Immigration (*sportello unico per l'immigrazione*) upon provision of various evidence.<sup>208</sup> In case the employer already knows the employee and quotas are available, the request is transmitted to the consulate of the foreign country. In case the employer does not personally know the prospective employee, he/she shall draw out of a list of possible available candidates who would have applied to work in Italy at the Italian consulate of their home country. As scholars have observed, the extremely limited programmed quotas and the extensive use of amnesties in the country have de-voided such system of any meaning, for it is in fact easier to enter Italy on a tourist visa, find a job and expect to be regularised through an amnesty (Colombo 2012: 836-842). Another instrument entitling long-term residents to legally reside and work in Italy is the so called “resident card for foreign citizens” (*carta di soggiorno per cittadini stranieri*). This type of permit has an open-ended term and can be requested by a non-EU citizen who has legally resided in Italy for at least five years, provided he/she meets a certain minimum annual income threshold.<sup>209</sup> Since 2011, in order to

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<sup>207</sup> *Supra*, footnote 187, Art.5.

<sup>208</sup> *Supra*, Art.14.

<sup>209</sup> *Supra*, Art.9.

apply for this permit an Italian language test is also required.<sup>210</sup> The 2012 overdue implementation of the 2009 EU Blue card directive on high-skilled workers has introduced blue cards in Italy, entitling highly skilled migrants to preferential treatment and additional rights.<sup>211</sup> According to the latest available data, as of 2014 only 165 blue cards had been issued.<sup>212</sup>

At the highest end of the governmentality spectrum of legal categories of belonging is the acquisition of citizenship. Italy recognises the right to dual citizenship. Citizenship can be acquired by *iure sanguinis*, passed on from parent to child without limitation of generation<sup>213</sup> or by *iure soli*, by individuals born on Italian soil who claim Italian citizenship after continuous legal residence in Italy up to legal age, and upon declaration of their desire to acquire it.<sup>214</sup> Citizenship can also be obtained by marriage to an Italian citizen: after two years of legal residence in Italy or three years after marriage in case of residence abroad.<sup>215</sup> Italian citizenship can further be acquired through naturalisation: after three years of legal residence in Italy for the descendants of former Italian citizens and foreigners born on Italian soil; after four years for citizens of an EU country; after 10 years for Third Country Nationals.<sup>216</sup> Remarkably, the Italian Constitution entitles all Third Country Nationals, regardless of their legal status, to the right to basic healthcare<sup>217</sup> and

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<sup>210</sup> Decreto del Ministero dell'Economia e delle Finanze, Contributo per il Rilascio ed il Rinnovo del Permesso di Soggiorno (*Decree of Economy and Finance Minister*) n.304 December 31, 2011.

<sup>211</sup>Decreto Legislativo sulle condizioni di ingresso e soggiorno di cittadini di Paesi terzi che intendano svolgere lavori altamente qualificati. Attuazione della direttiva 2009/50 (*Law Decree on the conditions of entry and residence for highly skilled Third Countries citizens implementing directive 2009/50*) n. 108, July 24, 2012.

<sup>212</sup>*Supra*, footnote 68.

<sup>213</sup> Nuove Norme in Materia di Cittadinanza (*New Norms on the Subject of Citizenship*) Law n. 91, 15 February 1992, Art. 1.

<sup>214</sup> *Supra*, Art.4.

<sup>215</sup> *Supra*, Art.5.

<sup>216</sup> *Supra*, Art.9.

<sup>217</sup> *Supra*, Art. 32.

education if they are of minor age.<sup>218</sup> Nevertheless, access to social benefits is only granted to foreigners who are in possession of a residence permit for one year or more.<sup>219</sup>

## 20. Irregular migration

While irregular migration has been a widespread phenomenon which has traditionally been dealt with through amnesties, a more recent governmental modality of dealing with irregular migrants has been administrative detention. Detention of migrants can take place upon irregular entry in the form of pre-admittance detention with the purpose of carrying out identity verification, implementation of readmission agreements and medical assistance.<sup>220</sup> Administrative detention has been in place since 2004 to allow for the processing of asylum requests.<sup>221</sup> A maximum detention period of 20 days for identity verification and of 35 days for all other circumstances (after which the asylum seeker is given a residence permit of three months) is provided for.<sup>222</sup> For irregular migrants subject to a removal order which cannot be promptly carried out, identification and removal centres have been in operation since 1998.<sup>223</sup> The main distinction among these three modes of detention modalities is that in the cases of pre-admittance detention and asylum seekers detention, detainees are allowed to walk out and leave the

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<sup>218</sup> *Supra*, Art. 34.

<sup>219</sup> *Supra*, footnote 187, Art.41.

<sup>220</sup> Law n.563/1995, 30 December 1995.

<sup>221</sup> Regolamento relativo alle procedure per il riconoscimento dello status di rifugiato (*Regulation on the procedures to obtain refugee status*) Decreto del Presidente della Repubblica (*Presidential decree*) 16 September 2004, n. 303

<sup>222</sup> Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato (*Implementing directive 2005/85/CE laying down minimum standards on procedures in Member States for granting and withdrawing refugee status*) Decreto Legislativo (*Legislative decree*) n.25, 28 January 2008, Art.20 subsection 3.

<sup>223</sup> *Supra* footnote 183, Art. 12.

detention facilities, which are normally managed by public or private entities such as charities.

Detention centres for the purposes of removal are normally managed by police and function very much as prisons. It is remarkable to observe that while in the 1990s detention measures used to be seen as exceptional within Italy's constitutional framework, such measures have now turned into an ordinary, rather than an exceptional measure against what are deemed to be socially dangerous individuals (Campesi 2013: 31). In 2001, a decision of Italy's highest Court confirmed the interpretation that irregular migrants' administrative detention is in accordance with the Italian Constitution.<sup>224</sup> Somewhat paradoxically, the inevitability of administrative detention is periodically revamped by what the government and media see as emergencies provoked by boat migrants' landings on Italy's coasts (Ibid: 32). Within national popular imagination, a landmark event marking the beginning of an era of emergencies was the 1991 landing of a vessel carrying 12,000 Albanians to Bari's harbour which were transferred and detained in Bari stadium before being repatriated. Most recently, the so called "North Africa emergency" prompted by an increase in migratory flows to Italy following the Arab uprisings led the government to declare a state of emergency which lasted for almost two years.<sup>225</sup>

When detention for the purposes of removal was introduced in 1998, seven detention centres were created, providing for the custody of about 1.000 detainees overall (Colombo 2012: 3303-3314). As of 2014, 13

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<sup>224</sup> Corte Costituzionale (Constitutional Court) Ruling n.105, 2001.

<sup>225</sup> Decreto del Presidente del Consiglio dei Ministri - Dichiarazione dello Stato di emergenza Dichiarazione dello stato di emergenza umanitaria nel territorio del Nord Africa per consentire un efficace contrasto all'eccezionale afflusso di cittadini extracomunitari nel territorio nazionale (*Prime Ministerial Decree – Declaration of a state of humanitarian emergency within North African territories authorising an effective counter-response to the exceptional afflux of extracommunitarian citizens into national territory*) 7 April 2011. The decree was extended on 6 October 2011 until 31 December 2012.

detention and removal centres existed across the Italian peninsula, although only five of them were functioning. In 1998 the maximum period of detention in migrant detention and removal centres was fixed to one month. This period was gradually raised through subsequent changes to the legal framework. In 2011, the implementation of the Returns Directive in 2011 elevated the maximum detention period from six to 18 months.<sup>226</sup> In 2014, the maximum period of detention was reduced from 18 to three months.<sup>227</sup> Remarkably, estimates show that small numbers of those who are detained within such facilities are in fact repatriated. In 1998, 57% of detained irregular migrants were removed. Since then the repatriation percentage of the number of detainees has remained generally low: 30% in 2001 and 38% in 2009 (Colombo 2012: 3661-3668). In 2013, only 48% of the total of migrant detainees had been repatriated.<sup>228</sup> The incapacity of the Italian authorities to proceed to removal is due to various reasons ranging from expiration of maximum detention terms to the lack of judicial endorsement from Third Countries (Ibid: 3925-3932).

While these low repatriation statistics reveal that the Italian state effectively removes very few reported illegal immigrants, this practice is still key in reassuring the national public for it spectacularises Italy's power to detain and expel irregular migrants and thus becomes "a tangible proof" that the state can protect its own citizens from those who are not authorised to live among them (Sciurba 2009: 115). The low numbers of actual removals has further prompted scholars to hypothesise

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<sup>226</sup> Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari (*Urgent provisions implementing directive 2004/38/EC on the free movement of EU citizens and directive 2008/115/EC on the return of irregular third-country nationals*), 23 June 2011, Decree No. 89/2011, Art.3.

<sup>227</sup> Law n. 161, 30 October 2014, Art.3 subsection e).

<sup>228</sup> Centri di identificazione ed espulsione: i dati nazionali del 2013 (*Identification and removal centres: 2013 data*), MEDU <http://www.mediciperidiritiumani.org/centri-di-identificazione-ed-espulsione-dati-nazionali/> Accessed 12 December 2014.

that migrant detention centres are not aimed at merely excluding irregular migrants, but rather, at creating a system which controls the speed of their mobility rather than blocking it (Mezzadra 2006: 109-110). The filtering would be functional to meet the demands of Italy's labour market in a timely manner. This is a labour market that is based on an informal economy largely fuelled by irregular migrant labour (Ibid).

### *21. Humanitarian concerns and borders' reinforcement*

As already mentioned, due to the Dublin system's first country of asylum rule, asylum seekers reaching the Italian coasts are required to apply for asylum in Italy and during the application process are considered illegal in other EU Countries.<sup>229</sup> Over the last years, the reception of asylum seekers and the processing of their applications has grown into a complex system which employs hundreds of thousands of employees from cooperatives, NGOs and government departments. Once migrants' fingerprints are taken and their application lodged, they enter a prolonged condition of legality while they wait for their asylum decision, which can take up to two years.<sup>230</sup> This temporary condition of legality might end with the rejection of the application or continue for years in cases of appeal or granting of other types of temporary protection. In 2015 for example, 58 percent of applicants were rejected, 5 percent were granted asylum, 14 percent were granted subsidiary protection. The majority of those who were granted legal status (22

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<sup>229</sup> Interviewees from a reception centre in Bologna reported for example the case of a man who went to Norway to apply for asylum and was detained and repatriated to Italy as many as 6 times. He was considered a criminal in Norway, and an asylum seeker in Italy.

<sup>230</sup> Attuazione della direttiva 2013/33/EU recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale. (*Implementation of 2013/33/UE directive laying down standards for the reception of applicants for international protection and directive 2013/32/UE on common procedures for granting and withdrawing international protection*) 18 August 2015, Decree n. 142, Art. 22.

percent) were entitled to a two-year maximum period of humanitarian protection, after which they would lose their legal status.<sup>231</sup>

Commenting on Italy's most recent humanitarian turn in border management towards an ostensibly more humane border management aimed at rescuing boat migrants rather than returning them, Cuttitta noted that on the one hand, humanitarian concerns render borders more traversable insofar as presence in the EU may be granted on the basis of the right to asylum and the right to family reunification (Cuttitta 2015: 131). On the other hand, the same humanitarian concerns are employed in borders' reinforcement, for example in order to protect the human rights of migrants from smugglers or from dangerous trips: in this way humanitarian and security concerns problematically intertwine, as shall be further seen in Chapter IV.

This excursus has shown how Italy's migration management, which has been traditionally characterised by a frequent use of amnesties and regularisation programmes to manage migration, has moved towards a securitisation of migration over the last decades. As the statistics of detention and removal in Italy further illustrated, the state is however only apparently inflexible and fully able to control its borders. The section also showed how similar to the EU level, legal categories of mobility in the Italian context are fundamentally embedded in an economic rationale which categorises migrants as dangerous on the basis of their economic worth. Finally, the observation of Italy's migration management at sea emphasised the relatively new and central role of

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<sup>231</sup> While international protection (political asylum) lasts for 5 years and is renewable, a 5-year renewable "subsidiary protection" can also be granted to somebody who does not meet the requirements to be recognised as a refugee, but would be at risk of serious injury if returned to the country of origin. Currently, the most commonly granted type of protection in the Italian case is however humanitarian protection", a temporary legal status granted whenever the threshold of international protection requirements is not fully met, valid for two years. [http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/riepilogo\\_dati\\_2015\\_2016\\_0.pdf](http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/riepilogo_dati_2015_2016_0.pdf) Accessed 25 January 2017

humanitarian concerns in border management. The next section shall discuss these ambiguous interconnections as well as other trends in EU migration management.

## PART V. TRENDS OF EU MIGRATION MANAGEMENT

This chapter's outline of the recent history of EU borders and the examination of the legal categories enacting them at the EU and national level highlights a specific trajectory of migration management in the EU, one that combines economic underpinnings in migration management with humanitarian and security discourses. These last sections examine the main features of current EU migration management and reflect upon their mutual connections.

### *22. Increasing securitisation of non-EU migration*

This chapter's historical outline of the legislation and policies constituting borders in the EU pointed towards a trajectory of a growing securitisation of non-EU migration, which coincided with the process of EU integration. The Foucault-inspired definition of securitisation adopted in Chapter I, connecting migration management to a broader politics of insecurity involving both local and migrant populations became useful in the evaluation of the recent history of non-EU migration management. The chapter observed how the increasing conceptualisation of entry and movement of non-EU citizens in the Union as a security issue has coincided to the minimisation of internal borders within the Union. Examples for such process included: the creation of the Third Pillar on Justice and Home Affairs in the Maastricht Treaty and the Area of Freedom, Security and Justice in the Amsterdam Treaty; the institution of the Schengen Information System, EURODAC, FRONTEX; the institutionalisation of administrative detention for



irregular migrants, sanctions for carriers and employers dealing with irregular migrants and so on.

It is important to stress that these measures have not been simply tools to control the movement of non-EU migrants but, as posited in Chapter I, they have shaped the way in which the mobility of Third Country nationals is currently conceived in the EU, that is, predominantly a security issue. I also noted how this process of securitisation of migration has concurred in the very definition of EU citizenship, as constitutively built on the exclusion of Third Country Nationals. The framing of certain categories of the latter as “dangerous” has further enabled the EU government to pose itself as a guardian of EU citizens’ security. In Chapter I, the Hobbesian link between citizens’ protection and political legitimisation was reframed through the notion of a “politics of insecurity” revolving around the dangers of migration employed by governments to increase their ability to control their population (Bigo 2002, Huysmans 2006).

As further mentioned above, the institution of an internal security sphere tackling non-EU migration has further been read as the result of a spill-over of the EU internal market in the European integration process (Huysmans 2006). The Foucauldian interpretation of neoliberalism put forward in Chapter I explains here how on the one hand, the neoliberal rationale behind the erasure of border controls in the Union can call for as little government intervention as possible in order to maximise profits. On the other hand, the maximisation of profits relies upon the constant possibility of government intervention to keep the negative effects of excessive freedom under control (Ibid: 94). In this respect, security policy, understood as “political and administrative practices that address excesses (e.g. a sudden inflow of very large numbers of immigrants) endangering the orderly conduct of freedom”, is key (Ibid). Consequently, the transformation of the EU external borders into filters

of dangerous free movement and the creation of technologies aimed at monitoring this dangerous excess of freedom within the population (i.e., Schengen Information System, EURODAC) is to be read in tandem with the pursuit of neoliberal economic growth orienting governmental decisions in the EU.

### *23. The economic underpinnings of EU migration management*

This chapter further revealed that although the nexus between migration and its economic uses is ambiguously articulated in legislation and official language, EU migration management has nonetheless deep economic underpinnings. The chapter started by remarking how the mobility of EU citizens was at its beginnings conceived as a function of the construction of a single European market. I further indicated that the financial means test for EU citizens internally migrating is a remnant of this underlying economic rationale. The latter heavily impacts on the categorisation of the mobility of non-EU nationals and their dangerousness. The consideration of legal categories in Part III illustrated how the label of “threat” to the internal security, welfare or cultural identity of Member States does not equally applies to all non-EU citizens: mechanisms of inclusion and exclusion of non-EU citizens are largely drawn along the lines of an economic rationale, which is inscribed in the logic of global neoliberalism.

Perhaps the clearest example of this economic orientation was the fast-track permanent residence status granted by many Member States to non-EU investors based on their economic worth. As this chapter illustrated, economic growth nevertheless remains a mostly unspoken policy goal of migration management of non-EU citizens. In spite of that, this chapter showed how an economic rationale pervades legal categories of mobility and intersects with security issues. As currently legal routes into European countries are only available to affluent, hyper-

skilled individuals and family members, most non-EU migrants are left with the only option of irregular routes. While legal recognition is granted to asylum seekers who are lucky enough to make it into the EU space, most non-EU migrants are left with the only option of irregular routes and irregular work and are criminalised. The logic emerging from the current legal framework is that hyper-skilled or well-off migrants do not represent a threat to EU national societies or economies, while other migrants who do not possess the skills or capital in demand are highly undesirable and threatening for EU societies.

Notwithstanding this depiction, all national markets in Member States continue to profit from inexpensive and readily exploitable irregular migrant labour. The latter has turned into a structural necessity for Member States as a result of the neoliberal shift within social relations and political economies over the last thirty years or so. Whether the absence of legal labour migration channels is the result of a hidden economic agenda or of the lack of acceptance of migrant populations by national public opinions within Member States, the abovementioned pro-legal labour migration approach that the Commission adopted since the early 2000s reflects the reality of the EU economic situation: millions of non-EU workers are and will be increasingly needed to sustain the EU's current levels of welfare, given the shrinking working-age population in Member States.

The case of border management in the Italian case further shed light on another perhaps less intuitive economic dimension of migration management. As mentioned earlier, the reception of asylum seekers has grown into a complex line of business which employs hundreds of thousands of employees from cooperatives, NGOs and government departments. The economically productive nature of border controls and the management of irregular migration, consisting of preventive operations, search and rescue operations, processing centres, detention

centres and so on, has been grasped through the notion of an “illegality industry”, precisely to foreground the economic profitability of the EU external border controls (Andersson 2014: 15).

All the above were examples of how EU and national governments capitalise on migration, and use migration management as a tool for boosting the local political economy. Despite such pursuit of economic growth orients the management of migration in the EU, this chapter showed that the nexus between migration and the economy is rarely articulated in migration legislation and official language. Together with security, I observed that humanitarian concerns have instead become a key overarching category in non-EU migration management: together with family reunification, the humanitarian route has become the main way of being acknowledged legal status in the EU for most non-EU population since the 1990s.<sup>232</sup> The use of political asylum as the main channel to legal migration status in contemporary Europe is problematic as it possibly occludes the economic character of migration policies behind ostensibly neutral humanitarian reasons. This issue will be further elaborated on in Chapter IV in the light of the comparison with the Chinese case.

### *Conclusion*

Moving from an outline on the recent history of the borders regulating migration in the EU since its beginnings, I showed how from being an economic occurrence - a corollary to the free movement of

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<sup>232</sup> The use of political asylum as an alternative tool to migration management is not new. As mentioned earlier in this chapter, in the past Northern EU countries conceded high quotas of asylum but this was combined with very restrictive immigration policies. On the contrary, Southern EU Countries were traditionally very restrictive with the acknowledgment of asylum protection, but often regularised migrant workers through regularisation programs and amnesties.

goods and capital - free movement for EU Member State nationals to other Member States gradually expanded to categories of economically inactive citizens and became the very condition upon which full enjoyment of the additional rights derived from EU citizenship is enjoyed. I further illustrated that the progressive erasure of internal borders in the EU happened at the price of a substantial strengthening of the EU's external borders in relation to Third Country Nationals. While the movement of EU citizens within the European space is encouraged, the movement of Third Country Nationals is criminalised. The securitisation of their mobility into the EU was shown both in an historical perspective as well as in the consideration of the various legal categories and profiles available to migrant individuals. The chapter further highlighted the predominant economic rationale underpinning current legal categorisations. According to the latter, low waged migrants are considered dangerous for the host society, while hyper-skilled or investor migrants are welcomed through easier and even at times fast-track permanent residence statuses. As most legal avenues for labour migration into the EU have been erased, currently the principal legal way of entry for most migrants is connected to family reunification and high skilled migration. At the same time, those who manage to enter irregularly are presented with the only option of asking for humanitarian protection. The alternative is to be persecuted as illegal migrants threatening the security of EU societies.

When looking at this context alone, these trends might strike one as unavoidable outcomes of a specific trajectory. As I suggested in Chapter I, a vision from another place might rebut this view and offer fresh perspectives. The next chapter thus moves to the discussion of the Chinese case. In the latter, the issue of migration, both internal and international, has undergone a somewhat contrary trajectory of de-securitisation over the last decades and has been characterised by an open pursuit of economic growth.

## CHAPTER III

### Shifting borders of mobility in China: recent history, categories and trends

#### *Introduction*

“Too many people, too little land” (*di shao ren duo*), is an expression often evoked in China, the country with the largest population on the globe, which accounts for one sixth of the whole world’s and double the size of that of the European Union. The Chinese nation is also no typical nation state.<sup>233</sup> Differently from the relatively recent territorial configurations of the EU or its Member States,<sup>234</sup> before becoming a nation state China has been an empire administratively covering nearly the same territory for millennia. For matters of space and scope this chapter will nevertheless limit itself to an account of borders in China since the establishment of the People’s Republic of China in 1949. As anticipated in the introduction to this work and in Chapter I, in spite of growing numbers of migrants, the issue of migration in China underwent a relative de-securitisation over the last decades. This trend strikes as opposite to the growing securitisation of non-EU migration which has typified EU migration management over the last decades. The detailed account of the laws, policies and measures operating as obstacles or incentives to human mobility in the Chinese context will

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<sup>233</sup> This assumes the ideal-type nation state is the European nation state, which have imposed themselves on the rest of the world as the primary politico-legal units of the modern international state system (Torpey 2000: 2-3).

<sup>234</sup> Although Europe as a geopolitical centre has existed for centuries, the European Union as a united politico-legal entity is of recent formation. As seen in Chapter II, its shape has further varied over last decades. It could further be argued that even taken individually, the oldest European state in its existing territorial configuration dates back to two centuries ago or so.

function as a counterpoint to the account of borders in the EU presented in Chapter II.

The management of China's gargantuan population in the recent past has been characterised by a strict control of its internal mobility from poor rural areas to comparatively better-off urban centres through the *hukou* system. During Maoism, the restriction of internal migration was facilitated by China's planned economy system. Such control was in turn instrumental to the functioning of the command economy, forcing peasants in rural areas – which accounted for 80 percent of the population – to extract the raw materials and staples needed to develop the industry in urban centres.

Over the last three decades or so, China's gradual transition to a socialist market economy has prompted a liberalisation of these borders. The transition to a socialist market economy has led the Chinese government to similarly liberalise its international borders, previously open only to a few sympathisers of the communist regime and restricted to Chinese citizens seeking to exit the country.<sup>235</sup> Although over the last decades international migration has risen exponentially compared to Mao's era, it remains insignificant in size compared to internal migration. This is also why it will remain somewhat secondary in this chapter's account of China's migration management, which has internal borders as its top priority. The account of China's migration regime provided in this chapter will offer an alternative view to what was presented in Chapter II and shall exemplify how different migration regimes may present diverse priorities and configurations. This chapter's analysis will progressively reveal how with its open, at times ruthless, pursuit of neoliberal economic growth as its main policy goal, China's migration regime uniquely exposes to how the EU migration regime

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<sup>235</sup> This restriction also characterised in XVII and XIII century Europe, where states emigration was limited and even banned following a mercantilist logic which equalled the loss of subjects with a loss of economic and military power for the state (Green and Weil 2007 in Castles et al. 2013: 297).

is for the most part ambiguous regarding the connection between migration and its economic role, its uses or benefits.

In order to better understand the legal and policy framework of migration management in China, the chapter will begin with a brief introduction to the Chinese legal tradition and China's legal system's current characteristics. Part Two will then provide a general overview of China's internal borders as demarcated by the *hukou* system. Since 1958, this system has enforced what has been defined an "invisible wall" between China's urban and rural areas (Chan 1994). The *hukou* has further been described as the "number one document in China" for its power to preside over many facets of life, if not the destiny of the majority of the Chinese population (Chan 2009: 198). By regulating and determining the life chances of Chinese citizens along the urban-rural distinction, the *hukou* system has further shaped the status and rights of Chinese citizens and has created a second class of citizens (Chan 1994: 135; Solinger 1999: 7; Wang 2005: xii; Buckingham and Chan 2008: 582). I will show that from an initial conception of rural to urban migration as a phenomenon which had to be severely restricted, after Deng Xiaoping's launch of the Open Up and Reform Policy in 1978 the legislation has gradually shifted to an attitude of allowing such internal mobility. As shall be seen, despite a general de-securitisation of internal migration and the recent reforms of the *hukou* system at various levels, legal affiliation and welfare rights in China's largest cities remain a prerogative of the wealthy and high-skilled few.

In Part Three I will consider somewhat more concisely the history of China's external border regime in relation to Chinese and foreign nationals. Since the first decades of the PRC until the late 1970s, the emigration of Chinese nationals was restricted and considered treacherous to the socialist state. Ever since China's economic reforms in the 1980s, external borders have been dramatically de-securitised in relation to Chinese citizens, to the extent that at present the emigration of Chinese nationals is celebrated as a



patriotic gesture contributing to the country's economic development. I will show that China's external borders have undergone a similar opening up in relation to foreign nationals from a period where immigration was seen as a high security matter and only political sympathisers were allowed into the country, to one where foreign nationals are for the most part perceived as an economic opportunity and their number in the country has increased dramatically.

Reflecting the same structure adopted in Chapter II to examine the EU migration regime, Part Four examines the array of legal profiles bestowed upon individuals on the move by different legal categories. I will note that most of China's internal migrants are still referred to as a "floating population" (*liudong renkou*), residing in cities without a permanent legal status either as temporary *hukou* holders or as irregular "floaters". I will note that nevertheless, differently from the EU context, irregular status - possibly characterising most of China's floating population - does not have criminal repercussions on the lives of internal migrants as it did in the past and is merely perceived as an administrative incompliance. Among the main categories of *hukou* conversion, a procedure for which the majority of rural migrants do not qualify, I will refer to state employees, investors, talents and highly educated or skilled migrants and remark the economic rationale underlying most of these categories.

I will then consider how legal categories of mobility across international borders - including overseas Chinese, naturalised citizens, foreign workers, family members, irregular foreign migrants - are similarly oriented by an open pursuit of economic growth as the main policy goal of migration management. Part Five further surveys the case of China's internal borders by examining closely the case of Beijing, the city with the most restrictive legislation on internal borders in the country. I will reveal that even in the city with the strictest *hukou* legislation in China, the implementation of *hukou* regulations is sporadic and ad-hoc. Part Six will discuss the main features of

China's contemporary borders. It will posit that the prioritisation of economic growth as China's leading policy goal in the reform era has not only led to a de-securitisation of borders but also to an open articulation of the relationship between economy and migration management in law and official language.

## PART I. LAW IN THE CHINESE CONTEXT

As pointed out in Chapter I, comparative analyses expose the different shapes law assumes in different contexts. The more diverse the contexts in comparison, the more rewarding the outcome. China's legal system stands as different from Western legal systems due to its historical origins and some of its current characteristics. This first part briefly discusses the main legal theories in traditional China, from which the legal system of the People's Republic has sprouted. I will then account with a bit more detail the most recent history of China's legal system, from Mao's era to the present time. The final sections discuss the main characteristics of China's current legal system in terms of conceptions of law, its relation with policies and human rights issues. The clarification of these themes will be crucial to better contextualise the comparison with the management of migration in China examined in the rest of this chapter.

### *1. China's traditional legal culture in the imperial era*

Many fundamental concepts of China's traditional legal culture date as early as the Zhou dynasty (1027-770 BC). One of the principal ideas is that the ruler rules by virtue of mandate of Heaven, and society is governed in accordance with *li*, which translates as propriety, rituals and moral standards. Western scholars have often drawn equivalents with the concept of natural law in early modern West with *li*. In contrast to that, *fa* indicates approximately what in a Western context coincides with laws, but in the narrower connotation of criminal sanctions. These two concepts have often been played against each other throughout China's intellectual history. On

the one hand, Confucius (551–479 BC) and his followers endorsed a government by *li*: they believed society could naturally be regulated by moral standards and generally did not need punishment. The way *li* applied depended on one's position within society and family; the Confucian ideal of society was a hierarchical one, characterized by a paternalistic vision of the ruler and a very strong sense of family as the main unit of society.<sup>236</sup> The government of the state was not any different from ruling over a family: in both cases harmony was achieved through the observance of *li*. The conceptual fusion of family and state realm elevated moral cultivation to the rank of state law (Chen 2008: 12). Confucianists believed in the possibility of educating human beings and deemed education, rather than punishment, to be the key to maintaining social order. In this context, law applied only to those who had crossed the boundaries of civilized conduct, and was generally considered a primitive stage of humankind, prior to that of a voluntary observation of morals.

The other leading cultural reference in China's legal tradition is legalism, a school of thought which developed during the Warring States period (475–221 BC). On the opposite side of Confucianism, legalists conceived the man as immoral by nature: hence, they advocated a strict reliance on law and punishments as the government's main instrument to achieve political order. The harmony of the social order was reached by notably cruel punishments which in legalists' mind functioned as a deterrent against committing crimes.

<sup>237</sup> While the legalist school had its highest influence during Qin dynasty (221–207 BC), succeeding dynasties kept the legal system created under the

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<sup>236</sup> According to Confucius, five fundamental relations existed in human interaction: the relationship of ruler and minister; father and son; husband and wife; elder and younger brother; friend and friend. While three of these already pertain to the realm of the family, the remaining two referred to the same family logic: a ruler was conceived as a father to its minister and the hierarchy between brothers would apply to friendly relationships (Chen 2008:12).

<sup>237</sup> Depending on the gravity of crimes, the punishment could range from tattooing, beating with sticks, amputation of various parts of the body to death by strangulation or death by slicing (Chen 2004: 16–17).

Qin while reforming some of its crueller features, in favour of rule based on Confucian values of ethical and moral persuasion. The influence of Confucianism on the administration of law, peaked during the Tang Dynasty (618-907 AC) with the Tang Code, which merged both Confucian and legalist principles in the law.<sup>238</sup> Within this system, moral teaching remained the most important means of social control in imperial China: law was considered “secondary and supplementary to morality”, written codes were mainly related to criminal matters, while civil disputes were normally determined through mediation led by leaders or elders (Chen 2004: 15). The legal system was primarily aimed at handling criminal cases and law was “indisputably a tool to serve the interests of the state” (Peerenboom 2002: 41). Even though the terms and details of the categories of legislation changed from dynasty to dynasty, for about two millennia imperial China was characterized by a stable system of codes which were kept up to date and enacted through sub-statutes, edicts, or were decreed by the emperor himself (Ibid: 36).

This situation changed in the late Qing period (XIX-XX century), in which the inability of the imperial dynastic system to maintain power both internally and externally prompted demands for reformation. The humiliating defeats of the Qing Dynasty by the British and Japanese empires<sup>239</sup> shattered the millennia-long assumption of the superiority of the Chinese civilization and shook the confidence of both rulers and subjects (Ibid: 43). As a response to the crisis and to consolidate power, the Qing government introduced a range of new measures to reform China’s legal

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<sup>238</sup> From a legalist perspective, the Code contained a very detailed matching of instances of crimes and punishments so that justice would be administered equally, and so that justice officers would be mere executors of the emperor's will. The Tang Code nonetheless considered the family and clans as the essential units of society; accordingly, it gave the highest importance to clans and family heads, according to the Confucian tradition.

<sup>239</sup> China was defeated by Great Britain in the First Opium War (1839–1842) and the Second Opium War (1856–1860), both involving disputes over British trade in China and Chinese sovereignty. The wars forcibly curtailed China's isolation from the rest of the world and weakened the Qing Dynasty. China also lost control over Korea to Japan in the First Sino-Japanese War (1894–1895).

system drawing on the experiences of Western legal systems. At the beginning of the 1900s, the first constitution was drafted, modelled on German and Japanese statutes. The courts were also modernized and efforts towards a professionalization of the judges and a bar were pursued (Huang 2001 in Peerenboom 2002:43). The aim of the Qing government was to use Western knowledge and technology but maintain Chinese identity. Legal reforms were conceived as a tool to achieve the emperor's aims and the emperor remained the source of laws.<sup>240</sup> The slogan at the time was “Chinese learning as the body, Western learning as a means” (*zhongxueweiti, xixueneiyong*). Nevertheless, as the legal reform process mainly entailed changes in black letter law, it soon fell apart as irreconcilable with the existing social structure (Wang and Zhang 1999: 8). After the 1911 deposition of the last Qing emperor, the Nationalist government guided by Sun Yatsen continued to pursue legal reforms and drafted a number of new laws drawing on Western codes. Nevertheless, legal reforms during the Republic period (1911-1949) did not establish themselves durably due to the recurrent economic and political crises as well as the government's lack of political and military control over the country.

## 2. *Law in the socialist State*

The influence of Marxist-Leninist ideology is crucial to understand how China has managed the mobility of populations across its internal and external borders, especially during the first decades of life of the PRC. Remarkably, the influence of a Marxist-Leninist approach to history in legal thinking has survived up to today and the majority of legal history textbooks published in China still adopt this approach.<sup>241</sup> In the first years of life of the

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<sup>240</sup> Hence, despite a new generation of legal scholars increasingly promoting individual civil rights, to this day many scholars and legal practitioners associate the notion of law with the power of the strongest, even when law promotes collective aims.

<sup>241</sup> The latter divides human history in five stages: primitive society, slave society, feudal society and capitalist society. The fifth stage of society is a socialist society, where the private property of means of production has been eradicated and the communist party leads the nation towards the

PRC, various laws were promulgated and ideologically supported by the concept of socialist legality, which at that time was being promoted by Stalin in the Soviet Union. The latter posited that, differently from capitalist societies, the laws enacted under socialist systems are a most advanced form of law, needed by the state to eradicate all capitalist remnants (Lo 1997:470).<sup>242</sup> The new government enacted various Organic Laws setting the structure of the state laws and in 1954 it promulgated a Chinese Constitution. However, as Mao's theory of law was deeply entangled with ideology and politics, law soon acquired "a class nature" connotation: instead of prescribing abstract and universal norms, legal provisions were mostly adopted to endorse the accomplishment of political objectives or to officially enunciate political principles (Sapio 2010: 34). Conceived as an instrument for the Party to promote class struggle, laws were enforced through political campaigns and mass movements rather than through formal judicial institutions (Lo 1997: 473-474). An example is the launch of an "Anti-Rightist Campaign",<sup>243</sup> where many jurists, lawyers and judges were purged. Along the same lines, the Ministry of Justice and the Ministry of Supervision were abolished in 1959.<sup>244</sup>

This period was characterised by law which did not exist as a domain separated from the political sphere and mostly stemmed from political

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achievement of a communist society (where the antagonism between classes will be completely abolished and state apparatus will become superfluous).

<sup>242</sup> Vyshinsky's theory of law, supported by Stalin after 1936, posits that law has a positive value of social regulation in the socialist transition. Such perspective opposed the position theorised by Pashukanis, who argued for a "commodity exchange" theory of law. According to the latter, law and socialism were incompatible: since a commodity economy system was the condition for law, law would have disappeared as the commodity economy withered away (Lo 1997: 470).

<sup>243</sup> The "Anti-Rightist Campaign" originated in the 1956 Party policy of encouraging intellectuals to voice their opinion ("letting a hundred flowers bloom and a hundred schools contend"). However the policy resulted in harsh criticism of the Party's performance and policies and led the government to remove those critical of the government actions.

<sup>244</sup> 中华人民共和国第二节人民代表大会第一吹全会关于撤销司法部, 监察部的决定 (First Plenary Session of the Second National People's Congress of the People's Republic of China decision on suppressing the Ministry of Justice and Ministry of Supervision) 28 April 1959. 人民日报(People's Daily), 29 April 1959.

campaigns (Dutton 2009: 30). The legal framework at the time was to be found within “editorials from the official voice of the Communist Party, The People’s Daily, speeches from Party leadership and the necessities and consequences of mass campaigns” (Ibid). Party policies were enacted as law - as an instrument for class struggle - or alternatively outdid laws (Peerenboom 2002: 46-47). Policy decisions were often passed through administrative orders rather than laws and had mandatory force on local governments and enterprises (Wang and Mo 1999: 2).

The legal scene further deteriorated with the Cultural Revolution, during which one of the targets of the red guards was the dismantlement of the bourgeois legal system.<sup>245</sup> As a consequence, law schools were shut down, professionals of the legal realm prosecuted or forced to change profession; procuratorates were officially removed in 1968 and only reinstated in 1978 (Chen 2004: 32). When not eradicated, the courts connived with police organs, under military rule. Decisions on criminal cases were normally subject to the authorisation of the local party committee (Ibid: 33). Arguably, between 1966 and 1976 the impact of laws on the social sphere was irrelevant. While the chaos of the Cultural Revolution came to an end in 1969, mass campaigns and social chaos continued until Mao’s death in 1976.<sup>246</sup> Dutton describes the political setting under Maoism as a revolutionary type of governmentality, whereby “the mentality of government defined life itself” and produced a new kind of political subject, one which was directly deployed against the enemies of the government at all levels (Dutton 2009: 35). This process gave rise to the internalisation of

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<sup>245</sup> Although the reasons leading to the Cultural Revolution are still unclear, scholars agree that it originated from the struggle between Mao and a more reformist faction among high ranks of the Party. Chairman Mao mobilised masses of red guards across the country, mostly composed by students and youths. What followed was a period of social chaos, which many Chinese define today as a period of civil war and anarchy in society (Chen 2004: 30-31).

<sup>246</sup> For this reason, many scholars conventionally mark the Cultural Revolution period as a decade (1966-1976). The change in the balance of powers within the Party’s internal politics in favour of the pragmatist faction is embodied by the prosecution of the Gang of Four a month after Mao’s death in 1976.

political commitment by political subjects, which “demanded and produced a homologization of all facets of life” (Ibid).

Over the last three decades, China has undertaken what is possibly the fastest development of a legal system in world history (Chen 2012: 13). The affirmation of Deng Xiaoping in 1978 as China’s new leader represents a crucial step towards the construction of a legal system. After a decade of social chaos, Deng’s conception of law was oriented towards practical goals. While proclaiming his allegiance to ideology,<sup>247</sup> Deng nonetheless asserted the essential role of law to maintain social order within a socialist society.<sup>248</sup> For the first time, the legal system was proclaimed by Party leadership to be essential for socialist modernisation. A stable legal system was seen as fundamental to maintaining a social order conducive to the economic modernisation envisioned by the Open up and Reform Policy (Chen 2008: 51). The legal reforms gradually began in the 1980s. Instead of following an ideal model, reforms were adopted through an approach of “crossing the river by groping for stones” (*mozhe shitou guobe*) and proceeded through a series of exploratory stages and pilot projects. On the one hand, between 1949 and 1978 the government’s focal point was class struggle and power consolidation. Within this context, law was seen as an instrument for the State to eradicate capitalist antagonistic forces (Yu 1989: 40). On the other hand, in Deng’s era the instrumentalist function of law shifted from serving class struggle to serving the goal of economic development (Ibid: 42). This notion was illustrated by Deng’s “Two-Hands’ policy” which stated that on the one hand, economic development must be pursued while on the other, the legal system must be reinforced (Ibid). While Deng’s approach to law substantially differed from that promoted during Mao’s era, it should be

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<sup>247</sup> Deng insisted on “four cardinal principles”: the socialist road, the dictatorship of the proletariat, the Leadership of the Party, and Marxism-Leninism and Mao Zedong Thought.

<sup>248</sup> Deng promoted legal reforms through five slogans: first “there must be laws for people to follow”, second “those laws must be observed”, third “law breakers must be dealt with accordingly”, fourth “law enforcement must be strict” and fifth, “everyone is equal before the law” (Lo 1992:649-65).



stressed that the pursuit of a legal system remained for Chairman Deng a tool rather than an end in itself (Chen 2008: 53). More specifically, law became a tool to guarantee the social conditions for market economy to function as post-1978 China's government as political organisation shifted from "an era of political distinction" between ideological friends and enemies<sup>249</sup> into one of "economic distinctions ... a social dynamic based on profit and loss" (Dutton 2005: 19). The regulatory role which the legal system assumed in the reform era is a very good illustration of the Foucauldian critique of the neoliberal economy considered in Chapter I, Section seven, as an artificial system which produces the desired effects only under certain conditions which are not naturally there but rather, constructed and maintained by governments.

In 1982, a new constitution was drafted<sup>250</sup> as part of a new wave of economic and legal reforms pursued throughout the 1980s. Even though Tiananmen events in 1989 decelerated the pace of reforms, the latter resumed following Deng Xiaoping's 1992 Southern trip, which gave new impetus to their pursuit.<sup>251</sup> In 1996, Party Secretary-General Jiang Zemin introduced as a new policy principle the slogan "ruling the country in accordance with the law and establishing a socialist rule-of-law state" (*yifa zhiguo, jianshe shehui zhuyi fazhiguo*). The notion of a country ruled according to law was later integrated into the amendments to the Chinese constitution in

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<sup>249</sup>Dutton interprets the recent political history of China (pre- and post-revolutionary) through concepts borrowed from Western theory, by combining Hannah Arendt's remarks on politics as commitment and Carl Schmitt's insights on politics or "the political" as constitutively determined by a friend/enemy divide (Dutton 2005: 9-12). In his account, political passions and commitment were at the basis of both the revolutionary movement - which resulted in the 1949's revolution and establishment of the People's Republic of China - as well as political life during Mao's leadership (Ibid: 11). In this context, the friend/enemy distinction which characterised Party politics since 1927 became a way of thinking for the whole nation during Maoism (Ibid). This conception progressively washed-out after 1978, replaced by a way of thinking and a policy-making based on profit and loss rather than on ideology (Ibid).

<sup>250</sup> The Chinese Constitution is not directly justiciable in China and no Constitutional Court exists.

<sup>251</sup> The speech which Deng gave during his visit to the Southern cities of Shenzhen and Zhuhai in 1992 was perceived as a sea-change ideological step towards reform and economic openness.

1999.<sup>252</sup> Throughout the 1990s, law-makers largely drew on experiences and models in Western countries in the effort to establish a socialist rule-of-law state. The growth of China's legal corpus is a tangible fact: in 1978 only 63 laws and judicial interpretations existed in total. Impressively, as of August 2011, China had enacted, in addition to its Constitution, 240 laws, 706 administrative regulations, and over 8,600 sets of local regulations.<sup>253</sup> Despite the growth of China's legal corpus, Western scholars have questioned the progress of legal reforms. According to some, since the late 2000s there has been a "turn against law" in China, mostly visible in the judicial realm, where the government is increasingly demanding judges<sup>254</sup> to drop their commitment to the systematic application of laws in order to pursue the Party's goals (Minzner 2011: 939, Minzner 2015). Other scholars have rebutted this, arguing that these developments in the judicial system are not enough to validate the "turn against law" hypothesis, and that this thesis is "biased towards liberalism and liberal legality" (Peerenboom 2014: 210).<sup>255</sup> Others have rejected the notion of a turn against the law by stressing that China has been relentlessly prolific in enacting new legislation and amending old ones - in all areas of law – and has increasingly made efforts to implement such legislation (Chen 2012: 18, Chen 2016). The next sections explore in more detail some of the main characteristics of China's contemporary legal system which relate to the legislation of China's internal and external borders.

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<sup>252</sup> 中华人民共和国宪法 (1999 年修正最新版) [Chinese constitution (1999 Amended version), Second Plenary Session of National People Congress, Art. 5.

<sup>253</sup> 中国特色社会主义法律体系 (Improvement of the Socialist Legal System with Chinese Characteristics) White Paper, Information Office of the State Council of the People's Republic of China, 27 October 2011, subsection 1.

<sup>254</sup> While Chinese courts exercise their judicial power independently from administrative organs, public organisations and so on, the Chinese Constitution posits the leadership of the Party as central. Moreover, most *judges* are *Party members*. As a result, the courts are not independent from the Party and their main duty is to carry forward the Party's goals.

<sup>255</sup> In other words, the assessment of the existence of a turn against law in China would be implicitly based on the idea that over the 1980s and 1990s China's legal reforms were following the trajectory of European and American systems.

### *3. Administrative structure and characteristics of the legal system*

As already mentioned in Chapter I, an important feature of China's legal framework is the multi-level hierarchical administration which characterises the distribution of power between China's centralised government and local areas. The highest level of governance is the central government, from which follows the provincial level, which consists of 33 provincial level regions which include 22 provinces, four municipalities (Beijing, Tianjin, Shanghai, Chongqing), five autonomous regions (Inner Mongolia, Xinjiang, Tibet, Guangxi, Ningxia), two special administrative regions (Hong Kong and Macau).<sup>256</sup> Below the provincial level - directly addressed by the central government in law-making – lie in order of importance the prefectural level, the county level and at the bottom of the ladder the township and towns' level. The laws, policies and official documents promulgated by the central government act as guidelines which local governments at various levels implement according to local conditions.

The National People's Congress (NPC) is China's highest legislative power. However, since this organ meets in plenary session only once a year, the majority of laws are promulgated by its Standing Committee. Below the legislation enacted by the NPC, executive bodies led by China's State Council are also entitled to enact administrative decisions, measures, opinions, regulations and so on. The directives issued by the State Council are more authoritative and effective than those promulgated by other executive bodies (i.e. ministries). People's Congresses at the provincial and municipal level may further promulgate local regulations and decisions, and the same applies to executive bodies at the provincial and municipal level.

In case of conflict of laws, laws and regulations at the national level prevail over local regulations and legislative bodies prevail over executive

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<sup>256</sup> The PRC also claims the province of Taiwan as the 34th region of China. However, Taiwan has a separate legal system and does not follow the lead of the PRC's central government.

bodies at the same level. Nevertheless, as shall be seen in the case of *hukou* reforms, national legislation has often been overlooked in the case of pilot projects and legal reforms, which were first experimented with at the local level and then - when successful - extended to the rest of the country through national legislation. This is a particularity of the Chinese legal system which strikes as different from Western legal systems. Moreover, contrarily to Western states' judicial systems - where a lot of the work of courts consists in the interpretation of statutes - in socialist civil law China the interpretation of laws and regulations remains a task reserved to the organs (legislatures, ministries, commissions, local government and their various bodies) which promulgated them. For this reason, this chapter will mainly deal with legislation and policies rather than with case law.<sup>257</sup>

Another peculiarity of the Chinese system is that national legislation normally sets minimum standards and leaves local governments leeway to implement such standards through local legislation which suits best the local circumstances.<sup>258</sup> Partly due to this reason, China's primary legislation is often broad and vague.<sup>259</sup> This characteristic enables governments at various local levels to suitably interpret national law according to the local circumstances and the fast-changing conditions of the policies in effect. As a result, the enactment of secondary and tertiary legislation has a key role in the implementation of primary legislation (Otto 2000: 222). As some scholars noted, although China is a unitary and not a federal state according to the Chinese Constitution, in actual fact the politico-legal relationship between central and sub-national governments bears a resemblance to

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<sup>257</sup> The only body entitled to engage in judicial interpretation with normative effect is the Supreme People's Court, China's highest court.

<sup>258</sup> To be sure, the same rationale guides the legal instrument of directives in the EU, which require Member States to achieve specific results through national legislation and leaving Member States leeway on how to achieve such results.

<sup>259</sup> This is particularly the case of legislative instruments such as opinions, which identify certain goals of reform but are mainly programmatic and need further legislation at national or local levels to be put into effect.

practices of federalism (Potter 2011: 14). This loose yet centralised relationship between centre and periphery is a legacy of imperial China and has been key in the government of and cohesion of such a vast political unit for millennia.

#### *4. Legal instrumentalism and rule of law in China*

A feature of the Chinese legal system which has somewhat endured since the Maoist period in the management of China's internal borders is the supremacy of policies over laws. Despite the commitment to the construction of a legal system after 1978, some legislation – including the one regulating China's borders - ought to be considered as a consolidated version of policies, which is enacted “when the time is ripe” (Keller 2000: 222). The supremacy of policies over laws in the context of the implementation of China's internal borders will be observed later when discussing the case of the promotion of economic development, as the government's main policy priority after 1978. While at times the policy of promoting economic development has effected the advancement of legislation regulating the economy, in other circumstances the pursuit of this same policy goal has instead entailed the non-enforcement of the existing legal framework. For example, despite the 1958 Household Registrations law forbidding Chinese citizens from moving without permission across China's internal borders, since the 1980s rural migrants have been able to travel to the cities as a result of the new policy to prioritise economic growth.

What can be noted here is a general attitude considering law as a tool for the government to achieve other ends rather than an end in itself. Scholars have described this phenomenon as legal instrumentalism (Yu 1989). As I have noted elsewhere, the enforcement of China's internal borders is a typical case of legal instrumentalism (Fu and Pasquali 2015). As previously discussed, this instrumentalist conception of law can also be found in late imperial China, when the emperor conceived of the introduction of Western

law as a means of restoring social order and China's sovereignty. This instrumentalist conception has somewhat endured during Maoism, when law became a means to pursue class struggle. After 1978, the leadership began to consider law as "a better tool than policy, capable of securing and institutionalising ad hoc policies in a more universal manner" and creating the conditions for stability and social order required to develop the economy (Chen 2008: 53). The persistence of legal instrumentalism in certain domains of law thus generates a legal theory conundrum. In the case of the *hukou* system legislation, the unresolved theoretical dispute among legal scholars has been whether the current *hukou* system is currently under an inborn "illegal" destiny or whether it has assumed a "market-demand" justification (Lu 2009: 133).

The tendency of policies to override laws in the Chinese context relates to a classic debate among (Western) scholars of Chinese law is whether law in China should simply be seen as a tool for the Party-state to impose its policies or whether China could be conceived as a rule of law system. For Lubman, the Chinese legal system is not built to contain the power of the Party-state but it is rather a tool for the latter to control China's people (Lubman 2000). While acknowledging the tremendous changes that China's legal system has undergone, Lubman rejects the notion that China has a legal system due to the lack of coherence he perceives in its current institutions. Stressing the instrumentalism of law and the supremacy of policy over law in China, he sees an "inescapable contradiction between the avowed goal of attaining rule of law and the ideological limits" of the one-Party government: the Chinese Communist Party's priority of maintaining stability would equate to party control and legal developments would serve the purpose of an instrumental law (Ibid 2000: 7).

Peerenboom has offered a more optimistic view based on what he terms "thin theory" of the rule of law, as opposed to "thick theories" of the rule of law (Peerenboom 2002). Thick theories relate law to specific forms of

economic, social and political standards such as specific economic systems (i.e. capitalism or central planning) forms of government (i.e. electoral democracies or one-party systems) and notions of rights (liberal, communitarian, “Asian values” among others) (Ibid: 3).<sup>260</sup> On the contrary, thin theories embrace “the formal or instrumental aspects of rule of law” and more broadly refer to a system of laws that are “general, public, prospective, clear, consistent, capable of being followed, stable, and enforced”(Ibid: 3). Peerenboom’s analysis of legal reforms in China further distinguishes between rule of law and rule by law: the latter being legal systems within which the law is only or predominantly a tool of the state, while the former refers to legal systems within which laws impose meaningful limits on state actors (Ibid: 83).<sup>261</sup> In his analysis, although “the footprint of the system’s instrumental rule-by-law heritage” is still present, there is substantial evidence of a shift from a rule by law system towards “a system that complies with the basic elements of a thin rule of law”(Ibid: 558).

As the previous section illustrated, within the span of few decades China shifted “from a state with hardly any law” at the end of the Cultural Revolution to what was officially proclaimed in a 2011 White Paper as a “socialist system of laws with Chinese characteristics” - with substantial legal institutions, comprising “law-making authorities and courts at national, provincial and local levels, large numbers of judges, procurators, lawyers,

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<sup>260</sup>Peerenboom observes that for instance, the liberal-democratic thick version of rule of law is characterised by free market capitalism, multi-party democracy and an interpretation of human rights that prioritises civil and political rights “over economic, social, cultural, and collective or group rights” (Ibid: 3). In the Chinese case, a state socialism thick version of rule of law is defined by a socialist form of economy –one in which state ownership has a greater role than in market economies-, a non-democratic system in which the CCP has a prominent role and an understanding of rights which highlights social stability, collective over individual rights and subsistence as the main right instead of civil or political rights (Ibid).

<sup>261</sup> This distinction is very valuable as it allows us to avoid the trap of what was described in Chapter I as legal orientalism which in this specific case would lead Western scholars to assess China’s legal system based on their thick conception of liberal-democratic rule of law.

legal aid workers, law schools, government organs charged with promoting legal knowledge among members of the public, etc.” (Chen 2012: 12). Whether one decides to consider China as a “thin” socialist rule of law system, which as such functions within the limits set by the Party-state, or to stick to Western-like definitions of rule of law and thus consider China as a rule by law system, it is important to stress that in liberal democracies the rule of law also functions within the limits set by the democratically elected governments. An example comprises the extra-legal security measures enacted at border zones or in places outside state jurisdiction, such as Guantanamo Bay prison in the case of the United States. The limits are related to what is considered a major threat for the stability of the politico-legal unit in question. Next section tackles another somewhat related issue: human rights in the Chinese context.

#### *5. Human rights in the Chinese context*

China’s pledge to uphold international human rights laws often sees China at the centre of international criticisms. Although the country is signatory of several human rights treaties, the Chinese government promotes a specific interpretation of human rights that questions the universal validity of some of these rights and exposes the different purposes that rights are supposed to achieve (Peereboom 2002: 533-4). The position of the Chinese government is that international human rights and the capacity of the international community to make claims based on such rights are limited by national sovereignty and that other states should not employ human rights as a pretext to intervene in its internal affairs (Ibid: 534). As China’s authoritarian politico-legal system is based on non-liberal values, there is an inherent conflict between such a system and the international regime of human rights, which is instead built upon a liberal framework (Ahl 2015: 639).



According to Marxist-Leninist ideology, due to the State's monopoly over law and the instrumental character of it, human rights are neither innate nor inalienable but rather, they stem from and are granted by the government (Chen 2005: 169, 172). Moreover, human rights are contingent and depend on the level of economic development of the politico-legal unit in question (Ibid). Such interpretation leads to the subordination political and civil rights to economic development, and to a prioritisation of subsistence and self-determination as the basic rights upon which all other rights hinge on (Ahl 2015: 643). Although socialist ideology is no longer a defining element of China's political organisation, as Bjorn Ahl pointed out, the party-state remains ordered according to the Leninist notion of socialist party dictatorship, which revolves around the hierarchy of the party organs, to which "all areas of administration, police, judiciary, military, economy, and society" are subordinated (Ibid: 643).<sup>262</sup> This structure results in substantial restrictions on several civil and political rights, such as on freedom of speech,<sup>263</sup> as well in the denial of other fundamental rights - such as the right to life, the right to a fair trial, the prohibition of unlawful detention and torture - to those perceived as a threat the system's social stability, most notably political dissidents and human rights lawyers (Ibid).

At the same time, China partakes in the international human rights regime, is member of several human rights treaties and increasingly engages in international human rights' dialogues. Remarkably, in 1998 China joined the 1966 International Covenant on Civil and Political Rights,<sup>264</sup> although it has not ratified it yet. In 2009, the government issued its first national

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<sup>262</sup> The Party system has monopoly over admission to senior leadership positions in the government and in society; the system of internal discipline control gives party members immunity from the jurisdictional organs and a capillary monitoring and manipulation of media silences the opposition (Ibid).

<sup>263</sup> These restrictions are seen as vital for the survival of the single-party system, to maintain social stability by preventing criticism of the political system itself.

<sup>264</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

Human Rights Plan (2009-2010), where for the first time the issue of human rights protection in China in was explicitly addressed in the legislation.<sup>265</sup> The release of this plan, which has been followed by two others,<sup>266</sup> shows the increasing influence of the language of human rights in the Chinese context, regardless of whether this document is to be interpreted as an effort to silence internal and international criticisms or an actual step to improve human rights protection. Another interesting tool in this respect is China's annual issuing of a Human Rights Record of the United States, in reply to US State Department's Human Rights Report, to compensate human rights criticisms normally addressed against China.<sup>267</sup>

As this section has illustrated, China is not rejecting human rights in toto as international media or NGOs would often have it. Human rights are increasingly part of China's official language, in spite of the government's different interpretation of how rights should be prioritised and implemented in practice and how other states and human rights organisations may overreach on national sovereignty to rectify their alleged violations. Acknowledging the Chinese policy does not mean of course that all violations of human rights by the Chinese government can be justified. As will emerge from this chapter, the issue of human rights in China's migration management is almost inexistent. Moreover, a striking difference from the

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<sup>265</sup> Information Office of the State Council of the People's Republic of China, National Human Rights Action Plan of China (2009-2010) [http://english1.china.gov.cn/official/2009-04/13/content\\_1284128.htm](http://english1.china.gov.cn/official/2009-04/13/content_1284128.htm) Accessed 17 August 2017.

<sup>266</sup> Information Office of the State Council of the People's Republic of China, National Human Rights Action Plan of China (2012-2015) and Information Office of the State Council of the People's Republic of China, National Human Rights Action Plan of China (2016-2020).

<sup>267</sup> State Council Information Office of the People's Republic of China, Human Rights Record of the United States in 2016, 9 March 2017. [http://news.xinhuanet.com/english/china/2017-03/09/c\\_136115481.htm](http://news.xinhuanet.com/english/china/2017-03/09/c_136115481.htm) Accessed 16 August 2017.

EU context is that China's migration regime China lacks a system of international protection for asylum seekers and refugees.<sup>268</sup>

This introductory part showed how moving from a system with hardly any law at the end of the Cultural Revolution, over the last few decades China has built a legal system with substantial legal institutions which in many respects differs from Western legal systems in terms of conceptions of law, its relation with policies and interpretations of human rights. Now that the main features of the Chinese legal system relevant to this thesis have been clarified, we can move on to the analysis of China's internal and external borders.

## PART II. HISTORY OF CHINA'S INTERNAL BORDERS

As already mentioned in Chapter I, currently the phenomenon of rural to urban migration in China encompasses as many as 260 million internal migrants and exceeds the total of the whole world's international migration combined. These impressive numbers are a recent outcome of a progressive liberalisation of the *hukou* system, which until the 1970s locked Chinese citizens in their location of *hukou* registration. Crucial shifts have happened in the management of mobility across China's internal borders over the last fifty years or so. This section will provide an historical overview of how China's internal borders have evolved since their establishment in the 1950s. It will account for the transition from an initial conception of rural to urban migration as a phenomenon which had to be severely restricted through policies and legislation, to a gradual but steady de-securitisation of internal migration since the launch of the 1978 Open Up and Reform Policy. I will remark how China's government economic-oriented approach to internal

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<sup>268</sup> This feature could not be farther from what observed in the European context, where human rights discourses are instead omnipresent and a common bargaining chip in migration management.

migration has most recently led to the acknowledgement, in legislation and official documents, of the key role of internal migrants' labour in China's economic miracle and the promotion of their rights and well-being. Despite such changes and the most recent *hukou* reforms which have enabled *hukou* conversions in small and medium urban centres, I will conclude that welfare rights in China's largest cities, the most popular destination for internal migrants, remain the prerogative of local *hukou* holders and of the wealthy and high-skilled few.

#### 6. (Re)establishment of the *hukou* system

While the organisation of the population according to *hukou* registration dates back to more than two millennia ago,<sup>269</sup> the *hukou* system established by the PRC government in the 1950s has been characterised by a degree of enforcement, rigidity and totality which is unprecedented in China's history (Wang 2005: 58). In the first years of the PRC, freedom of residence for all Chinese citizens was practiced and recognized in the law, within documents such as the 1949 Common Program of the Chinese People's Political Consultative Conference<sup>270</sup> and the 1954 Chinese Constitution.<sup>271</sup> However, in the 1950s, increasing numbers of rural migrants moving to the cities started to alarm the authorities, fearful of mass migration and political instability. As a consequence, the first regulations on the household

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<sup>269</sup> China also took inspiration from the Soviet Union's system of internal passports (*propiska* system) to establish its *hukou* system in the 1950 (Dutton 1992:207). However, the *hukou* system is among the oldest Chinese political institutions: almost all imperial dynasties since the Qin (3rd century BC) as well as the Republic of China (1912-49) implemented variants of this system, which was originally set up for the purpose of taxation and social control (See Wang 2005: 32-43 and Dutton 1992: 189-91).

<sup>270</sup> 中国人民政治协商会议共同纲领 (Common Program of the Chinese People's Political Consultative Conference) 9 September 1949, at the First Plenary Session of The Chinese People's Political Consultative Conference.

<sup>271</sup> 中华人民共和国宪法 (People's Republic of China Constitution) 20 September 1954, The First Session of The National People's Congress, Art. 90.

registration system were introduced in 1951.<sup>272</sup> Although at this stage strict checks on population movements were not fully implemented, in 1955, immediately before the process of collectivization, an Instruction on the Establishment of a Household Registration System further required local governments to implement a permanent *hukou* system.<sup>273</sup> At around the same time, the policy of state monopoly on the purchase and selling of grains, guaranteeing food rations to urban residents, was launched. Through this arrangement, the *hukou* system assimilated “a role of resource allocation, opportunity prioritizing and differential treatment by location” (Wang 2005: 45).

China’s current *hukou* system was finally established in 1958 by the Household Registration Administrative Regulations.<sup>274</sup> Still in force today, such regulations provided every PRC citizen with a household registration (*hukou dengji*) by birth and prohibited citizens from permanently moving from rural areas to urban areas unless formally varying their household registration. In order to register elsewhere, the applicant needed to produce an employment certificate issued by an urban labour department, or a letter or offer from a higher education institution, or documentation proving permission to move issued by an urban household.<sup>275</sup> Temporary movement, which could not exceed three months, also required an official authorisation.<sup>276</sup>

The *hukou* registration consisted of two parts: the first is the place of registration, based on an individual’s presumed regular residence. This in turn fell into two categories: urban centres or rural settlements. The second

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<sup>272</sup>城市户口管理暂行条例 (Provisional Regulations on the Governance of Urban Populations) 16 July 1951, Ministry of Public Security.

<sup>273</sup>关于建立经常户口登记制度的指示 (Instruction on the Establishment of a Household Registration System), 22 June 1955, State Council.

<sup>274</sup>中华人民共和国户口登记条例 (Instruction on the Establishment of a Household Registration System) 9 January 1958, National People’s Congress

<sup>275</sup>*Supra*, Art. 10

<sup>276</sup>*Supra*, Art. 16

part is *hukou* classification, which is referred to as either agricultural (*nongye*) or non-agricultural (*feinongye*) *hukou*, determining a person's entitlement to an array of rights for activities in a specified place.<sup>277</sup> At the time when the *hukou* was established, the system allowed the government to control and restrict the relocation and employment of the rural population in urban areas and became a key instrument of the command economy. The establishment of the *hukou* system transformed China into a dual rural-urban society. The efficacy of China's internal borders relied on two other administrative systems, to which different employment schemes, social welfare systems and public service supplies were allocated: the commune system in the countryside and the work unit system (*danwei*) in the cities.<sup>278</sup>

In rural areas, the collectivisation of agriculture went on to be organised by way of tying rural workers to land. In order to collect food rations from their harvest, workers had to attend work in the production teams to which they were assigned. In the event of absence, not only would they not receive their food rationing, but their absence would have repercussions on an individual's whole family earnings and food rations (Whyte and Parish 1984: 85, 87, 105). In parallel, work units in urban areas provided workers with lifetime employment, food rations, housing and welfare services, the so called "iron rice bowl" (*tie fanwan*). This urban-rural divide of the population was instrumental to the achievement of the targets of China's industrialisation. The immobility of the peasants was functional to extract and accumulate the natural resources needed to develop the urban areas of a predominantly rural economy. The structure was combined with a system of household residency controls by local police and neighbourhood committees, so that illegal migrants to urban areas would not only be unable to work, but also be deprived of permanent residence and the right to

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<sup>277</sup> The weak legal basis of such an all-encompassing institution has been remarked on by some scholars: the legal grounds of the *hukou* system is to this day a regulation passed by NPC Standing Committee and not by the National People's Congress in plenary session (Josephs 2011: 298).

<sup>278</sup> For a comprehensive account of the *danwei* system see Bray 2005.

receive food (Walder 1986: 37-8). As a result of this, the *hukou* system developed into a system of resource allocation which institutionally excluded rural residents from the benefits available to urban citizens (Wang 2005: 45).

The way in which this system combined migration controls with the denial of nourishment and welfare to sanction mobile individuals without authorisation is an exemplary illustration of the Foucauldian notion of biopolitics mentioned in Chapter I. In the twenty years which followed the establishment of the *hukou* system, rural-urban migration was by and large eradicated from the Chinese socio-political space.<sup>279</sup>

During the Cultural Revolution period, the breakdown of the central authority eased China's internal borders between rural and urban areas. In the 1970s, following an anti-urban revolutionary ideology, millions of cadres, teachers and students were sent to the countryside on a rotating basis; the revolutionary chaos enabled illegal rural migrants to move to the cities and be employed by urban enterprises on temporary contracts, meaning these migrants had to return to the villages when their jobs came to an end (Davin 1999: 13). Remarkably, the new 1975 Constitution removed the right to freedom of establishment for Chinese citizens.<sup>280</sup> As a result of tight mobility controls between the 1950s and 1979, the amount of population *de facto* residing in a location different from their *de jure* residence (where they were "supposed" to be) was extremely small. In the early 1980s it was only 0.6 per cent of the total population (Chan 2009: 201). The state control over the allocation of resources in both rural and urban areas guaranteed the fixity of China's population to its assigned urban or rural areas. As already mentioned, this organisation of the population, impacting on the physical

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<sup>279</sup> Despite scholarly description of the period between 1949 until 1978 as "static decades", migration within China continued during this time. The reason why it is often not considered as such is that it was mainly involuntary, mandated by state planning for a host of reasons (Lary 1999: 31). Moreover, even though movement from rural areas to the cities was strictly prohibited, movement between different rural areas or from "a higher to a lower city" was tolerated (Ibid: 42-3).

<sup>280</sup> To these days, this right is still absent from the Chinese Constitution.

needs of the population in a bio-political fashion, was instrumental to the achievement of the targets of China's industrialisation during the planned economy system. While this policy successfully managed to prevent the overpopulation of cities and served the purposes of planned-economy industrialisation, it locked rural residents in the countryside. By regulating and determining the life chances of Chinese citizens along the urban and rural distinction, the *hukou* system instituted a first-class citizenship for urban *hukou* holders and second-class citizenship for rural *hukou* holders (Chan 1994: 135; Solinger 1999: 7; Wang 2005: xii; Chan and Buckingham 2008: 582).

### 7. *"Letting migrants move"*

A new migration wave started in the 1980s following the Open Up and Reform Policy. At its beginnings, internal mobility in China took off mainly in relation to state pilot projects. The most common example is the creation of Special Economic Zones where the violation of some nationwide laws was exceptionally allowed so as to experiment with capitalist market economy.<sup>281</sup> Such experimenting, combined with the 1978–82 agricultural reforms, enabled many rural workers to migrate to the cities in search of work, and cities to accept them on the condition that they would provide for their own daily food staples.<sup>282</sup> Rural mobility to the cities supplied the newly built industrial areas with a cheap and flexible labour force.

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<sup>281</sup>关于授权深圳市人大及深圳市委及深圳市人民政府分别制定法规与规章在深圳经济特区实施的决定 (Decision on Authorising the Shenzhen Municipal People's Congress, its Standing Committee and the Shenzhen Municipal Government to Enact Regulations and Rules which are to be implemented in the Shenzhen Special Economic Zone ) 1 July 1992, Standing Committee of National People's Congress; 立法法 (Law on Legislation) 1 July 2000, National People's Congress, Art. 63 -65.

<sup>282</sup> In 1982, the establishment of the "family responsibility system" made rural families responsible for individual pieces of land and allowed them to trade the surplus left over after paying the grain tax on the open market. This reform made agricultural production more effective and generated a surplus of workers in the countryside (Zhang 2013a: 146).



In 1984 the practice of mobility of rural *hukou* holders migrating to the cities for work was recognised in the law through the category of *hukou* with self-supplied food grain (*zilikouliang hukou*), enabling rural residents to move to urban areas upon condition that they could provide for their own food rations.<sup>283</sup> In 1985, the government further issued Provisional Regulations which officially allowed migration to small cities and introduced a temporary urban-resident permit (*zanzhuzheng*) for those temporarily moving to cities for business or employment purposes.<sup>284</sup> Remarkably, the preamble of such Regulations begins with the consideration that, as the country has embarked on a new path of economic reforms and internal migration has developed, temporary residence permits will better “suit the needs of the new model of development”. In the same year, ID cards for Chinese citizens were introduced, allowing citizens to be individually identifiable instead of having to rely on their collective *hukou* registration. In doing so, this new measure implicitly entitled Chinese citizens to more autonomy to move.<sup>285</sup>

The transition from planned economy to a socialist market economy made the systematic control of human mobility across China’s internal borders financially onerous and hardly viable for the government, which could not rely anymore on the distribution of staple food and job opportunities, which now circulated freely on the market, to deter internal movement. Yet, restriction was now achieved through policies encouraging rural *hukou* holders to “leave the land but not the village” (*litu bu lixiang*) and “enter the factory but not the city” (*jinchang bu jincheng*). The steady supply of cheap rural labour in the city was seen as temporary and easily dischargeable in times of economic contraction. As Xu argues, rural migrant labour

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<sup>283</sup>关于农民进入集镇落户问题的通知 (Notification on the Question of Peasants Entering Towns) 13 October 1984, State Council.

<sup>284</sup>公安部关于城镇暂住人口管理的暂行规定 (Provisional Regulations on the Management of the Population Living Temporarily in Cities and Towns) 13 July 1985, Ministry of Public Security.

<sup>285</sup>中华人民共和国居民身份证条例 (Regulations on Resident Identity Card in the People’s Republic of China) 6 September 1985, Standing Committee of the National People’s Congress, Art. 6.

became a “living policy instrument” to achieve China’s GDP growth and improve the living conditions of the national population as a whole (Xu 2009: 40). Deng Xiaoping’s policy slogan orienting the management of migration was that “everything should be centred on economic development” (*yiqie yi jingji wei zhong*). At this stage, migration from rural areas to the urban centres was simultaneously allowed for economic reasons yet still considered a security issue. For example, the practice of random police checks of residential permits and the detention and repatriation of undocumented migrants, which had been a major instrument for controlling rural-to-urban migration during Maoism, was consolidated into law by a 1982 *Regulation*.<sup>286</sup> Mobility from rural to urban areas did not normally entail any permanent *hukou* relocation due to the extremely low rural-to-urban *hukou* relocation (*nongzhuanfei*) quota set by the central government (0.15 percent of the total population in the cities per annum, later increased to 0.2 percent in the mid-1980s) (Wang 2005: 50). At this stage, the state simultaneously profited from and controlled internal mobility. This strategy resulted in a mode of governmentality that was directed at ‘making the cities live’ and develop economically but only letting migrants ‘move’ (Xu 2009: 42).

During the reform era, occasionally the government reversed the general tendency of relaxing the *hukou* system. For instance, at the end of the 1980s, urban employment outside of state planning was reduced and unauthorised changes from rural to urban *hukou* were prohibited (Ibid: 52). In spite of occasional restrictions, the trend of liberalising China’s internal borders continued steadily as China’s rural *hukou* holders kept moving to urban areas where their labour was in high demand. Wang has argued that especially after 1978, the legal measures enacted by the government have in fact been rectifications by the Chinese government “to recognise and accommodate the spontaneous bending of the *hukou* system by millions of citizens in the

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<sup>286</sup>城市流浪乞讨人员收容遣送办法(Regulations on Vagrants and Beggars management in cities) 12 May 1982, State Council.

form of floating population and unauthorised internal migration” (Wang 2005: 49).

#### 8. From “blocking” to “channelling” migration

The year 1994 marked a policy shift with the Ministry of Labour issuing *Temporary Regulations* which for the first time acknowledged migration as a legitimate activity and shifted from a policy of “blocking” migration to a strategy of “channelling” the movement in an orderly way in the official language (Xiang 2007: 5). The regulations envisaged the institution of a number of permits, such as temporary residence permits (*zanzhuzheng*) and occupation permits (*liudong jinyezheng*).<sup>287</sup> Although the original reason for the institution of residence and work permits was to better control migrant flows and preserve social stability, the management of migration created a whole “economy of migrants” (*mingong jingji*) for local governments and bureaus, (Xu 2009: 47-8) which began to capitalise on migration in various ways. On the one hand, the levies paid by migrants for these permits were seen by local city governments as a return for their additional work of migration management (Ibid: 6). On the other hand, rural migrants were de facto turned into a source of profit for local urban authorities (Solinger 1999: 86-91). It was also very easy for the latter to get rid of migrants as whenever they wished to decrease the number of rural migrants, they could stop dispensing the permits and by doing so, bluntly make the migrants “illegal” to be put in detention and deported (Xiang 2007: 6). Further, the management of migration by local governments should be seen in the context of a fiscal and administrative devolution of powers to local governments which began in the 1990s (and to this day is at the origin of the great diversity of local regulations governing China’s internal borders).

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<sup>287</sup>农村劳动力跨省流动就业管理暂行规定(Temporary Regulations for Inter-Provincial Migration of Rural Labourers) 17 November 1994, Ministry of Labour (now invalid).

Apart from profiting from levies on work and other types of temporary permits for internal migrants, in the early 1990s, faced with income scarcity and granted greater autonomy in fiscal policy, many local governments started to sell city *hukou* as a way of accumulating funds to develop infrastructures (Wang 1997: 160). This bluntly profit-oriented approach to migration management by local governments did not end with the central government's prohibition of direct sale of *hukou*. The central government approach was itself very ambiguous and continued to be caught between two conflicting factors: increasing cheap labour demand in urban areas and limited welfare and facilities in big cities (He 2003: 183).

Although direct sale of *hukou* was banned, the indirect sale and purchase of *hukou* continued under the practice of granting blue seal *hukou* (*lanyin hukou*), introduced in the early 1990s by large cities such as Shanghai, Shenzhen and Guangzhou.<sup>288</sup> As the local regulations stated, this legal instruments were introduced to better suit “the needs of a construction of a socialist market economy” and advance economic and social progress.<sup>289</sup> Blue seal *hukou* regulations are characterized by different local criteria for *hukou* acquisition through real estate purchase or investment and exist only at the level of local (provincial or metropolitan) policies. This type of *hukou* entitle their holders to a host of welfare benefits in the place of destination and can be obtained by making a big investment or a purchase of residential property which meet certain criteria. Additionally, the blue booklet is convertible to a permanent local *hukou* after some years of regular residence.

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<sup>288</sup> In other cities (i.e. Wenzhou in Zhejiang province) a similar type of *hukou* is granted to purchasers of property through a Green card *hukou*.

<sup>289</sup> See for example the currently effective 上海市人民政府关于修改〈上海市蓝印户口管理暂行规定〉的决定 (Shanghai Government regulation amending the “Provisional Regulations on the management of Shanghai blue chop *hukou*”) 26 October 1998, Shanghai Government, Art.1; 广州市蓝印户口管理规定 (Regulations on the management of Guangzhou blue chop *hukou*), 1 October 1999, Guangzhou Government, Art.1.

It appears that in the case of blue seal *hukou*, there is a trade-off of skills or investment in exchange for residence and welfare rights. Commenting on legal reforms in Shenzhen, some have described the relation between the government and the people in the case of blue seal *hukou* as one of sale and purchase: on the one hand, the facilitation of inflow of talents and investors is aimed at an increase of production capability for Shenzhen; on the other hand, blue seal *hukou* obtained through house purchase are bluntly aimed at increasing sales in the real-estate market (Wang 2012: 164-5). In 2001, the set migration quotas for rural-to-urban *hukou* relocation (*nongzhuanfei*) in small cities and towns were substituted with entry conditions decided by local governments (Wang 2005: 112). Until that time, the management of China's internal borders had ambivalently considered migration as a security phenomenon to be kept under administrative control and an economic resource. Motives for control ranged from 'limited urban infrastructure', 'disorder', 'difficulty in social identification', to 'protecting the employment of laid off workers' in the cities (Wang 2010 in Zhang 2013b: 169).

The most important policy shift towards a de-securitisation of internal migration in official language happened in late 2002 at the Sixteenth National Congress of the CCP (Zhang 2013b: 169). At the latter, the new leadership led by Hu Jintao and Wen Jiabao drew attention on "disadvantaged groups" (*ruoshi qunti*), of whom rural migrants are a major share, and promoted the notion of "putting people in the centre" (*yirenweiben*) and constructing a "well-off" (*xiaokang*) and "harmonious society" (*hexie shehui*).<sup>290</sup> In January 2003, the State Council issued another key document on internal migrants<sup>291</sup> which for the first time stressed the positive economic effects of rural to urban migration for both rural migrants

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<sup>290</sup> 中国共产党第十六次全国代表大会 (Sixteenth Congress of Chinese Communist Party), September 2002.

<sup>291</sup> As already mentioned, State Council directives are more authoritative and effective than any law or rule issued by ministries.

and the economic and social prosperity of Chinese cities.<sup>292</sup> Together with the statement of the 2002 CCP Congress, this document testifies a shift in the official language on migration which is more remarkable than those of 1984 and 1994. Not only since for the first time the positive effects of migration were acknowledged, but also because it placed migrants “at the centre” (Xiang 2007: 6). It marked the beginning of a shift from conceiving of the mobility of rural migrants as a mere instrument to achieve GDP growth to an approach aimed at serving migrants and protecting their rights, lives and wellbeing. This governmental move should be seen as part of a broader strategy to attain “overall state strength, national rejuvenation and happiness of the people” (Xu 2009: 40).

A further step in the direction of achieving an harmonious society was the 2003 abolition of detention and repatriation measures for internal migrants caught without papers following the outcry over the *Sun Zhigang* case (Ibid). Sun Zhigang was a university graduate who had migrated to Guangzhou for employment and was waiting to receive his temporary job permit. However, caught without a valid permit by the police, Sun was put into a detention facility and was found beaten to death there three days later.<sup>293</sup> Following the public upheaval of this case, the State Council repealed the 1982 legislation prescribing detention measures for illegal migrants, which currently only applies to beggars and vagrants.<sup>294</sup>

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<sup>292</sup> 国务院办公厅关于做好农民进城务工就业管理和服务工作的通知(Notification on Improving the Work of Managing and Providing Services to Peasants Who Move to Cities for Work) 12 April 2003, State Council, subsection 1.

<sup>293</sup> The Sun Zhigang case represents a landmark case in China's judicial history more in general, triggering debates over the question of the constitutionality of the Custody and Repatriation regulations, as well as the proportionality and reviewability of administrative punishments. 孙志刚刑事案件 (Sun Zhigang Criminal Case), 9 June 2003, Guangzhou Intermediate People's Court <http://www.gzcourt.org.cn/> Accessed 25 May 2013.

<sup>294</sup> 城市生活无着的流浪乞讨人员救助管理办法 (Regulations on Relief and Management of Vagrants and Beggars in Cities) 20 June 2003, State Council.

In 2006, some *Opinions* stated that the problems facing rural migrants working in cities and making an important contribution to the country's modernisation had to be resolved through rights' awareness promotion, training and employment.<sup>295</sup> In a similar vein, the promulgation of a new *Labour Contract law* in 2008<sup>296</sup> was aimed at promoting the practice of giving migrant workers written contracts and strengthening their labour protections (Ibid: 51).<sup>297</sup> It could be argued that while the principle "economic growth first" had in the past entailed local governments' capitalisation on migration and work and residence permits, in the 2000s the open pursuit of the same principle led the government to finally acknowledge the economic contribution that rural to urban migration had made to China's economic miracle. This move towards a promotion of the well-being of rural migrants should also be seen in the context of the government's pursuit of legitimacy through the promotion of a harmonious society.

At the same time, economic performance remains the very foundation of the national objective of an "harmonious existence" and currently constitutes the basis of the CCP's legitimacy. Again in 2006, another discriminatory use of the *hukou* system was mitigated. Until then, insurance compensation policies based their compensation on the different *hukou* type of client: individuals suffering the same injury or death were treated differently, for example, in case of death, the family of a rural *hukou* victim was compensated between half to one-third of that of an urban *hukou* victim (Wang 2010: 92-93). Following widespread public criticism of this flagrant discrimination, in 2006 the government this practice was amended so that all

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<sup>295</sup> 国务院关于解决农民工问题的若干意见(国发[2006]5号) (Several Opinions on Solving the Problems facing Peasant Migrants) Document No. 5, 31 January 2006, State Council, preamble.

<sup>296</sup> 中华人民共和国劳动合同法 (Labour Contract Law of the People's Republic of China), 1 January 2008, Order of the President of the People's Republic of China No.65.

<sup>297</sup> The 2008 Labour Contract Law was issued after a 1994 Labour Law failed to improve the employment conditions of migrants, especially the lack of stipulation of labour contracts.

victims of airline-related or government-caused unjust injuries or deaths would be awarded the same sums (Ibid: 93).<sup>298</sup>

### *9. Hukou reforms and enduring institutional exclusion in China's megacities*

In 2010, the gradual establishment of a residence permit system across the country was set as a target for the future.<sup>299</sup> In 2011, a *Notice* re-stated the need for equal rights and interests between local urban residents and rural populations registered as permanent in cities and towns.<sup>300</sup> In parallel, a series of pilot projects across the country experimented with reforms of the *hukou* system at a local level. These included the erasure of the distinction between urban and rural status within the same municipality,<sup>301</sup> the granting of 10 years' residential cards conferring urban benefits and welfare,<sup>302</sup> and the total abolition of the distinction.<sup>303</sup> After this experimentation, a 2014

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<sup>298</sup> However, the implementation of this system at the local level might still preserve discrimination. For instance, in order to receive the same compensation as urban residents, rural victims of traffic accidents in Shenzhen must have lived in Shenzhen for at least one year and have "a stable income" at the time of the accident (Wang 2010: 93).

<sup>299</sup> 国务院批转发展改革委关于 2010 年深化经济体制改革重点工作意见的通知 (Opinions about 2010 Deepening of the economic system reform: main working point) 27 May 2010, State Council.

<sup>300</sup> 国务院办公厅关于积极稳妥推进户籍管理制度改革的通知 (Notification on Actively and Steadily Promoting the Reform of the Household Registration System) 26 February 2011, State Council.

<sup>301</sup> See for example Chengdu and Chongqing 中共成都市委成都市人民政府关于全域成都城乡统一户籍实现居民自由迁徙的意见 (Opinion on a unified hukou registration system for the whole Chengdu municipality carrying out residents' freedom to migrate) 9 November 2010, Chengdu CPC Central Committee and Chengdu Municipal Government; 重庆市人民政府关于统筹城乡户籍制度改革的意见 (Opinion on reforming the hukou system as a whole in urban rural areas) 29 July 2010, Chongqing Municipal Government.

<sup>302</sup> See for example Shenzhen 深圳市居住证暂行办法 (Interim Measures of Residential Cards in Shenzhen) 20 May 2008, Shenzhen Municipal Government.

<sup>303</sup> See for example Fujian Shandong and Liaoning provinces 福建省人民政府批转省公安厅关于户籍管理制度改革意见的通知 (Notification on the Opinion submitted by the Municipal Public Security Bureau regarding the Administration of Hukou System Reform) 25 December 2001, Fujian Municipal government; 山东省人民政府办公厅转发省公安厅关于进一步深化户籍管理制度改革的意见的通知 (Notification on transmitting the Public Security Bureau Opinion regarding a further deepening of hukou system reform) 12 August 2004, Shandong Municipal Government; 辽宁省深化户籍管理制度



*Opinion* set nationwide standards for a *hukou* reform to be implemented by provincial governments according to their local circumstances and size. The *Opinion* mandates local governments to eliminate the distinction between rural and non-rural *hukou* type<sup>304</sup> and prescribes a unitary system of residence permits for non-local *hukou* in large cities.<sup>305</sup> It further introduces the full release of *hukou* restrictions in small towns and cities and a relaxation of the conditions in medium sized cities (500,000 to one million inhabitants) and in large cities (1-3 million inhabitants).

Significantly, the *Opinion* maintains strict control over the migrant population of megacities (with more than 5 million inhabitants, de facto the wealthiest cities in China). The latter are urged to curb migration through points systems granting urban-welfare privileges strictly to the highly educated and the wealthy few.<sup>306</sup> This restriction reflects the governmental will to control the pace of urbanisation in big cities to avoid social instability,<sup>307</sup> selecting desirable migrants once again according to their economic worth. As of May 2016, as many as 29 provincial level regions had relaxed restrictions on *hukou* with different modalities, according to their size and local circumstances.<sup>308</sup> Meanwhile, the 2014 *Opinion*'s erasure of the legal distinction between rural and urban migrants is to be conceived as both a substantive progress and a semantic reform whose impact remains to be seen.

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改革若干 规定(A number of Regulations deepening the reform of the Administration of hukou system) 20 April 2009, Liaoning Municipal Government.

<sup>304</sup>关于进一步推进户籍制度改革的意见 (Opinion on Promoting the Advancement of the Reform of the *Hukou* System) 30 July 2014, State Council, subsection 9.

<sup>305</sup> *Supra*, subsection 10.

<sup>306</sup> *Supra*, subsection 7.

<sup>307</sup> Megalophobia: China's biggest cities are afraid of growing bigger. They should not be. The Economist, 30 April 2016 <http://www.economist.com/news/china/21697871-chinas-biggest-cities-are-afraid-growing-bigger-they-should-not-be-megalophobia> Accessed 1 May 2016

<sup>308</sup> 29 省份出台户籍改革方案 部分地区放宽落户条件 (29 provinces officially launch household registration reform plans, some localities relax restrictions on the requirements to settle *hukou*), Xinhua, 29 April 2016 [http://news.xinhuanet.com/city/2016-04/29/c\\_128943564.htm](http://news.xinhuanet.com/city/2016-04/29/c_128943564.htm) Accessed 29 April 2016

The improvement of the welfare of rural *hukou* holders has been pursued. In 2002, a rural health insurance programme was created to partially bridge the gap in welfare benefits between rural and urban *hukou*.<sup>309</sup> The programme envisaged protection in old age and sickness for rural *hukou* holders. In 2007, the minimum living standard guarantee (*dibao*), previously a prerogative of the urban *hukou* holder, was extended to the rural poor.<sup>310</sup> This was followed by the introduction of a rural pension system in 2009.<sup>311</sup> The 2010 *Social Insurance Law*<sup>312</sup> importantly extended coverage of key urban welfare benefits (protection in old age, illness, work injury, unemployment and maternity leave) to all rural migrant with labour contracts working in cities. Yet, statistics show that the implementation of this scheme remains patchy.<sup>313</sup> Low numbers are due to a host of reasons which range from rural migrants' lack of a labour contract to local governments' lack of financial capacities to fund such programmes or fear of upsetting local industries, to the lack of portability of such funds between jurisdictions for migrants.<sup>314</sup> Legislation and policy documents by the central government have

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<sup>309</sup> 关于进一步加强农村卫生工作的决定 (*Decisions on the strengthening of the rural health system*) 29 October 2002, State Council.

<sup>310</sup> 国务院关于在全国建立农村最低生活保障制度的通知 (Notification of the State Council on Establishing the Rural Minimum Living Standard Security System across the Country), 11 July 2007, State Council.

<sup>311</sup> 国务院关于建立统一的城乡居民基本养老保险制度的意见 (Opinions of the State Council on Establishing a Unified Basic Pension Insurance System for Urban and Rural Residents), 21 February 2014, State Council.  
State Council.

<sup>312</sup> 中华人民共和国社会保险法 (Social Insurance Law of the People's Republic of China), 28 October 2010, Standing Committee of National People's Congress.

<sup>313</sup> As of 2016, the extra urban benefits prescribed by the 2016 Law have not been extended to most migrant workers. According to ILO statistics, only 30 per cent of rural migrants were covered by insurance for employment injury, and below 20 per cent for old-age pensions and health. See "Extending social protection to rural migrants", ILO, September 2016 <http://www.socialprotection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53859>  
Accessed 20 December 2016

<sup>314</sup> The lack of transferability of social contributions is perhaps the major disincentive for migrant workers to join the social security system, resulting in less cash-in-hand and limited benefits only accessible on the site. <http://www.chinoiresie.info/migrant-labour-and-the-sustainability-of-chinas-welfare-system/> Accessed 8 June 2017

nonetheless been steadily promoting the inclusion of rural migrant workers into the urban social security system. In 2013, a government policy set the target of a gradual merging of the urban and rural residents' health insurance system. In 2014 the pension insurance systems for urban and rural residents were unified.<sup>315</sup>

Despite all these positive changes, the institutional exclusion of millions of internal migrants working in China's megacities endures. A particularly pressing issue is the lack of access to free education for migrant children in large cities. A report estimated that as many as 61 million children (one fifth of all children in China)<sup>316</sup> are forced by this system to grow up in rural areas while their parents work in urban areas. Prompted by growing public concern, the government has recently promulgated a directive restating the laws against children's abandonment and prompting local authorities to protect left-behind children.<sup>317</sup> These legal measures however fail to address the core of the matter, that is, the impossibility for the children of rural migrant workers to access free education in the cities.

Over the years, the concern with rural migrants' well-being has been further combined in media and official discourse with their portrayal as vulnerable individuals doomed to poor living and working conditions. This phenomenon has also led many stakeholders, such as the Party, intellectuals, domestic and international NGOs, to speak out on behalf of rural migrants (Xu 2009: 53-4).<sup>318</sup> This discourse is part of a broader narrative according to which rural migrants and peasants have a low individual quality (*suǎn*) and

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<sup>315</sup> 国务院关于建立统一的城乡居民基本养老保险制度的意见 (Decision on developing a unified pension system for all urban and rural residents), 21 April 2014, State Council.

<sup>316</sup> Counting the cost of China's left-behind children. BBC News, 12 April 2016 <http://www.bbc.com/news/world-asia-china-35994481> Accessed 25 May 2016

<sup>317</sup> 加强农村留守儿童关爱保护工作的意见 (Opinions on strengthening the work showing concern for the protection of rural left-behind children) 14 February 2016, State Council.

<sup>318</sup> As remarked on in relation to the case of refugees in the European context, any categorisation of migrant individuals as vulnerable or victims is problematic as it deprives such individuals of political and legal agency.

are in need of improvement.<sup>319</sup> From this perspective, the government would bear the responsibility of “turning migrants outwardly but also inwardly into ‘urbanites’” (Ibid: 56). The distinction between individuals with low quality and those with high quality has a key function in regulating the conduct of rural migrants within current processes of citizenship by contributing to “understandings of the responsibilities, obligations, claims, and rights that connect members of society to the state” (Jacka 2009: 534). According to Yan, the improvement of rural migrants’ low quality by way of being urbanised, better instructed, and more trained for the market is functional for the government to maintain control over what would otherwise be a free labour market potentially disruptive for the social order (Hairong 2003: 510).

It should be further emphasised that while the protection of rights and welfare of rural migrants has become a key concern in the official language, the implementation of such progressive legislation has been very uneven. Gallagher has advanced the hypothesis that in the field of labour law, the “suboptimal” implementation of migrant workers’ legal protections is a deliberate governmental choice to maximise both political and market demands (Gallagher 2016: 8). In other words, the state would have delegated the implementation of new rights protections to workers themselves. Through the media and propaganda, the state promotes awareness of labour rights in order to trigger bottom-up legal mobilisation (Ibid).

Studies examining the understanding of law among migrant workers have further questioned the notion that the strengthening of the rule of law

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<sup>319</sup> *Suzhi* is a fundamental keyword of contemporary Chinese popular and official discourses. The word refers to “the innate and nurtured physical, psychological, intellectual, moral, and ideological qualities of human bodies and their conduct” (Jacka 2009: 534). It is currently referred to as a measure for the “quality” of individuals and divides individuals into those with low *suzhi* and those with high *suzhi*. The discourse around this word has been fundamental in post-socialist modes of governmentality in China.

necessarily improves the legal status of rural migrant workers in China's megacities (He et al. 2012: 36-7). In the place of a national system dividing the city from countryside, the de-securitisation of China's internal borders appears to be headed towards a scenario of free movement combined with a net of localised internal borders separating regions and urban areas by producing locally determined "entry conditions" for rural migrants (Wang 2010: 97). As Wang has argued,

Instead of a national Great Wall dividing city from countryside, the *hukou* system has evolved into many legal walls separating regions and cities by creating locally determined "entry conditions" for migrants. The various "*hukou* for money and talent" schemes addressed the mobility needs for the rich and well placed, while presiding over large rural-urban and regional gaps in a China with new internal brain and capital drains. (...) The *hukou* system, far from being abolished, is being commercialised, localised and differentiated. It continues to function as a multitude of floodgates while developing new flood-discharging channels with spontaneous cracks and leaks. Without some tectonic shift of political power, the system is likely to remain a major source of both control and conflict in the PRC (Wang 2010: 97).

Over the last fifty years or so China's internal borders as demarcated by the *hukou* system have undergone a process of de-securitisation. From an initial conception of rural to urban migration as a phenomenon which had to be severely restricted to serve the development of the socialist nation, since the 1980s policies and legislation have gradually shifted to an attitude of allowing internal mobility, which has been key in feeding the development of China's urban centres with cheap labour. As illustrated throughout this section, the relaxation of China's internal borders entertains

a close relationship with the government's pursuit of economic growth under the new conditions of market economy after 1978. The latter prompted millions of rural *hukou* holders to vote with their feet by leaving the countryside to pursue better life opportunities in cities. At the outset of China's transition to market economy such mobility was ambivalently sanctioned and allowed at the same time to suit the economies of China's cities. This governmental approach was centred on maximising economic development of the country as a whole at the expense of migrant workers' exploitation based on their unequal status. I observed how since then, the official language on rural migrants has evolved into an acknowledgement of migrant workers' key contribution to China's economic development and into an attitude of promotion of rights and well-being. I also showed that this new governmental approach is not without contradictions and ambiguities. The most striking one is that while currently China's internal borders allow Chinese citizens to move and establish in a preferred location, and their role and economic contribution is acknowledged in official documents, the borders demarcated by the *hukou* system still silently follow rural migrants moving to China's largest and most desired cities in the form of a lack of access to welfare benefits which confines them to a second-class citizenship status.

### PART III. HISTORY OF CHINA'S EXTERNAL BORDERS

Analogously to the case of internal borders, the management of migration across China's international borders has undergone numerous shifts since 1949. One of the most peculiar features is that such management also pertained to the mobility of Chinese nationals. While the right of emigration is considered as a given in most countries in the world, this has not been the case until recently in China. As in other socialist systems, until the 1980s emigration was considered as an act of desertion in the PRC. The

limitation of the right to leave and return to China was closely related to the same static logic underlying the *hukou* system. This situation progressively loosened after the launch of economic reforms. China has never had as many citizens overseas as at this historical juncture. According to the latest statistics available, in 2015 the number of overseas Chinese (*huaqiao*)<sup>320</sup> reached 60 million.<sup>321</sup> While until a few decades ago emigration was perceived as an act of desertion, currently the act of emigrating in pursuit of better education, work or investment opportunities has turned into a patriotic gesture towards the country's economic development.

Although China predominantly remains a country of emigration, since the 1980s it has also become a migrant destination country. The ratio of foreign migrants compared to the national population remains extremely small when compared to that of other migration countries or to China's internal migrants, which remain the government's main priority. Despite these small numbers, over the last few decades international migration has undergone a monumental increase. In 1978, only 229,600 foreign nationals had crossed the Chinese border as a consequence of China's closed-door policy, Western embargoes and UN sanctions (Liu 2011: 3). As a result of the Open Up and Reform Policy, China's external borders have been liberalised and the numbers of foreign nationals in China have grown exponentially. According to the latest statistics available, in 2014 almost 53 million foreign nationals entered China and 663,556 of them held residence permits with more than six months' validity.<sup>322</sup> On the other hand, permanent residents in China are very rare due to the strict criteria for acquisition. Similarly, the naturalisation of foreign nationals has been extremely uncommon and has been granted to very few foreigners since the

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<sup>320</sup> The term *huaqiao* includes both Chinese citizens abroad and foreign nationals of Chinese descent living outside the People's Republic of China.

<sup>321</sup> International Organisation for Migration on migration in China. <https://www.iom.int/countries/china> Accessed 21 August 2017.

<sup>322</sup> China Overview of migration activities, International Organisation for Migration report. Available at <https://www.iom.int/countries/china> Accessed 13 April 2016

inception of the People's Republic in 1949. The following section provides an historical account of the main policies and laws regulating mobility of Chinese citizens and foreigners across the PRC international borders since 1949.

#### *10. The ban on the emigration of Chinese nationals during Mao's era*

Between the establishment of the PRC in 1949 and 1978 the act of exiting the country for Chinese citizens was strictly controlled. At the outset, China's door to the outer world was mostly closed in order to give priority to the consolidation of the new government (Liu 2007: 134). Although to exit the country Chinese citizens had to apply for an overseas Chinese exit permit,<sup>323</sup> in the period from 1949 to 1957 freedom of movement was still recognised in the statutes.<sup>324</sup> During this time, hundreds of thousands of ethnic Chinese, many of whom were fleeing anti-Chinese policies and ethnic violence in Southeast Asia, returned to China.<sup>325</sup> Upon return, Chinese overseas were assigned to a specific overseas Chinese legal status. Overseas Chinese farms (*huaqiao nonchang*) were also created to separate the *huaqiao* community from the rest of the population (Ford 2014: 243-244). The return of Chinese overseas to contribute to China's modernisation was a primary legislative objective for the government and for this reason immediate relatives of Chinese overseas and returned Chinese were granted preferential treatments (Thunø 2001: 914). However, these preferential policies were revoked at the end of the 1950s (Ibid). Movement across external borders for Chinese nationals was restricted. At the end of the 1950s, the existing rules were repealed and the Ministry of Public Security

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<sup>323</sup> 华侨出入境暂行办法 (Provisional Measures on the Exit and Entry National Borders of Overseas Chinese) 2 August 1951, Ministry of Public Security, Art. 4.

<sup>324</sup> 中华人民共和国宪法 (Constitution of the People's Republic of China) 20 September 1954, National People's Congress, Art. 90.

<sup>325</sup> After the establishment of the Communist Party in China, anti-Chinese sentiment developed across South-East Asian countries as both a consequence of anti-Communist sentiments disseminated by the Cold War and a long-rooted antagonism towards overseas Chinese, often perceived by locals as economically better off (Ford 2014: 245).



proclaimed further limitations on Chinese citizens' exit and entry (Liu 2007: 138).

During the period of the Cultural Revolution (1966-1976), legal movement across external borders was denied to both Chinese citizens and former overseas Chinese.<sup>326</sup> Citizens who lodged an application to travel outside China or overseas Chinese wanting to enter China were suspected of treason and collusion with foreign states to conspire against China. As a result, many of them desisted from applying to enter or exit the country (Ibid: 138-139). In the 1970s a one-nationality policy, which remains in force today, was further introduced to instigate overseas Chinese to give up their Chinese nationality out of concern that dissatisfied components among Chinese emigrants could organise in counterpart groups for dissident activities within China (Ibid: 139). While there were practically no applications for exit and entry for private affairs, the political chaos and hazards characterising the decade of the Cultural Revolution prompted irregular emigration in the form of refugees (Ibid). At this stage, the socialist state system considered emigration as “defection and tantamount to admitting its own failure” (Nyíri 2002: 221).

#### *11. Emigration of Chinese citizens in the reform era*

Following the Open Up and Reform Policy, radical reforms to China's external borders were progressively introduced. Analogous to what happened to the borders of the *hukou* system, the economic reforms gradually loosened borders for Chinese citizens and overseas Chinese. In 1980, Regulations on Passport and Visa stipulated that Chinese citizens, overseas Chinese and aliens who wanted to exit Chinese borders could do so upon application for an exit visa.<sup>327</sup> The Regulations further conferred upon

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<sup>326</sup> As already observed in the case of China's internal borders, this stance is reflected in the removal of the right to freedom of movement from the newly drafted 1975 Constitution.

<sup>327</sup> *Supra*, Art. 9.

Chinese citizens with specific credentials the right to obtain a passport.<sup>328</sup> In order to get a passport, citizens had to undergo complex procedures, such as gaining approval from the work unit, submitting household registration evidence, an invitation from overseas as well as evidence of sufficient financial means for the duration of the visit. Citizens working for the government or a State-Owned Enterprise, the only ones who could really afford to travel abroad, had to go through an even stricter scrutiny process. As a result, the Regulations kept deterring almost all individuals who were likely to exit the state from doing so (Ibid: 141). Remarkably, it was even harder to acquire a passport if the person was a member of the Communist Party (Ibid).

In 1980 the Law of Nationality confirmed the one-nationality policy that had been in force since the establishment of the People's Republic.<sup>329</sup> At the same time, a number of policies reintroducing a privileged status for the relatives of Chinese overseas and returned overseas Chinese were implemented to attract remittances and investments from Chinese overseas (Thunø 2001: 914-5). In the newly drafted 1982 Constitution, the legitimate rights and interests of returnees, Chinese overseas and their relatives were recognised by the law (Ibid).<sup>330</sup> In the 1980s, various political bodies were revived or created with the double purpose of connecting with overseas Chinese and protecting the interests of returned overseas Chinese and their family members (Nyíri 2002: 211-212, Thunø 2001: 916). In 1984 a number of measures recognised the legitimate right to exit China for Chinese

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<sup>328</sup> 中华人民共和国护照签证条例 (Regulations on Passport and Visa of the People's Republic of China) 13 May 1980, State Council.

<sup>329</sup> 中华人民共和国国籍法 (Law of Nationality of the People's Republic of China) 10 September 1980, National People's Congress, Art. 3

<sup>330</sup> 中华人民共和国宪法 (Constitution of the People's Republic of China) 4 December 1982, National People's Congress, Art. 50

citizens.<sup>331</sup> Nevertheless, following the old ideological mindset, several local authorities did not implement these reforms (Liu 2007: 140). In all, during the first years of economic reforms legal entries and exits across China's border witnessed a remarkable increase, from 1.88 million people in 1978 to 12.8 million in 1984 (Ibid: 142). The right to enter and exit China for Chinese citizens in qualified terms was enshrined in a 1985 Law on the Control of Exit and Entry of Citizens and its implementation measures.<sup>332</sup> However, due to the lack of integration of this law into subsequent policies, its initial implementation was inconsistent and uneven (Ibid: 148).

In 1990, a Protection Law defending the economic privileges for returned Chinese and the dependents of overseas Chinese was promulgated as a tool to grow China's developing market economy.<sup>333</sup> Throughout the 1990s, the implementation of the 1985 Exit and Entry law was undertaken through a number of policies including the elimination of the need for submitting an invitation from abroad to exit China and the possibility of applying for a passport without the need for a permit from the work unit (Liu 2007: 146). By the late 1990s, China's policies of reaching out to ethnic Chinese by appealing to common ethnicity while simultaneously offering privileged investment conditions turned out to be very profitable (Ibid: 926-7). Between 2002 and 2005, further reforms were promoted, first through pilot projects and trial implementations. These included a "passport on demand policy", allowing citizens to apply for a passport by simply presenting their ID and *hukou* documents; the cancellation of the requirement of providing invitation letters when applying for passports; the establishment of special

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<sup>331</sup> For example, 公安部关于放宽隐私出国审批条件的情事 (Suggestions of the Ministry of Public Security on Relaxing the Conditions of Examination and Approval of Exiting China for Private Affairs) 11 April 1984, State Council.

<sup>332</sup> 公民出境入境管理 (Law on the Control of Exit and Entry of Citizens) 22 November 1985, National People's Congress.

<sup>333</sup> 中华人民共和国归侨侨眷权益保护法 (Law of People's Republic of China concerning the protection of the rights and interests of the returned overseas Chinese and the relatives of overseas Chinese) 7 September 1990, National People's Congress.

channels at airports for Chinese citizens; the relaxation of restrictions on travelling to Hong Kong and Macau, for which Chinese citizens still need a visa (Ibid: 150-151).

In 2007, a Passport Law came into effect and further systematised the legal framework of Chinese migration law. Gradually, restrictions on exiting China's external borders eased. As of 2016 most of the Chinese population can freely apply for a passport. Yet, the right to leave and return is still restricted for certain categories of people such as certain minority groups suspected of separatist claims (e.g. Tibetans and Uighurs), children without a *hukou*, and political dissidents (Chodorow 2015). The legal framework of 1985 was amended by the 2013 Exit Entry and Law, regulating the exit and entry of both Chinese and foreigners. The law confirms that Chinese citizens can apply for a passport and do not need exit permits to go abroad, however they still need to apply for exit/entry permits to travel to or from Hong Kong and Macau.<sup>334</sup> In the 2010s, a number of policy measures, such as permanent residence permits to attract the talent of Chinese overseas, have been further promulgated by cities with high-tech zones or free trade zones by such as Shanghai and Beijing.<sup>335</sup>

Over the 1990s and 2000s recent Chinese migrants, those who emigrated in the 1980s and 1990s, have started to receive more attention from the Chinese government. In 1996, a Directive called for the need to focus on new migrants (*xin yimin*) as “an important rising force within overseas Chinese and ethnic Chinese communities” (Thunø 2001: 922).<sup>336</sup> Different from the old Chinese diaspora, these individuals normally still held Chinese citizenship and were characterised by strong family, education and cultural

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<sup>334</sup> 中华人民共和国出境入境管理法 (The Exit and Entry Administration Law of the People's Republic of China) National People's Congress, July 1, 2013, Art. 10

<sup>335</sup> Capital aims to woo more top-level foreign workers, China Daily, 13 January 2016  
[http://www.chinadaily.com.cn/china/2016-01/13/content\\_23058308.htm](http://www.chinadaily.com.cn/china/2016-01/13/content_23058308.htm) Accessed 13 April 2016

<sup>336</sup> 国务院侨办关于开展新移民工作的意见 (State Council concerning ideas on developing work with new migrants) 22 January 1996, State Council.

ties. In other words, “new” emigrants distinguish themselves by way of their immediate loyalty to the Chinese state (Ibid). Since the 1990s recent emigrants have become the main target of the government’s preferential policies and are currently seen as an essential force to foster China’s economic development and international prestige. Although many of the government’s directives on emigration are not public, an examination of the role of Chinese emigrants in internal policies and directives has been conducted by Nyíri by way of looking at the references made to them by public officials in overseas Chinese studies journals and publications (2000, 2002, 2005). Nyíri’s analysis shows that for migration state brokers emigrants are currently deemed as “agents of the Chinese economy and polity”, instrumental to reinforcing the bond of overseas Chinese to China, and to improving China’s reputation in their host countries (Nyíri 2005: 155-156). Interestingly, the language used to portray them echoes the late Maoist language alluding to notions of national construction, modernisation and patriotism and depicting emigrants as active agents of China’s ongoing modernisation in an era of globalisation (Ibid: 156).

## *12. Protecting China from foreign influences in Mao’s era*

In her historical account of the management of foreign nationals in China, Brady suggests that the key to understanding China’s shifting borders towards foreign nationals since 1949 is Mao’s aphorism “make the foreign serve China”. In her view, this principle has held true regardless of the many forms the management of foreign nationals has assumed between 1949 and today (Brady 2003: 253). As the new government perceived their presence in the country as a remnant of China’s long period of international humiliation at the hands of foreign imperialists,<sup>337</sup> it soon proceeded “first to

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<sup>337</sup> Until mid-XIX century China, then an empire, had considered itself for millennia as the centre of the universe and had deemed other civilisations peripheral (the very term China in Mandarin, *Zhongguo*, which literally translates as “middle kingdom” reflects this worldview. Events such as the

clean out the rooms before inviting new guests”, as Mao had it (Ibid). Most foreign nationals in China voluntarily left the country or were ejected, imprisoned or executed. The “foreign affairs” (*waishi*) system established after 1949 drew careful distinctions between foreign nationals and Chinese citizens in all spheres of social life (Ibid: 249). China adopted a closed-door policy.

Despite a relatively very small group compared to percentages in other countries, foreign nationals have occupied a special place in the process of China’s nation building after 1949. As representatives of the outside world and remainders of foreign imperialism in China, their management has been “an essential element in the CCP’s hold on political power” (Ibid: 253). In the early years, anti-foreign sentiments were emphasised to bring forces together to promote national reconstruction under the Communist government. After having “cleaned the rooms”, the regime established a coercive entry and exit administration system with the purpose of strictly controlling both the influx of foreign nationals and their activities.<sup>338</sup> Similar to Chinese citizens, foreign nationals leaving China had to apply for an exit permit from the Public Security bureau of the municipality where they resided.<sup>339</sup>

During this time, only a small number of cautiously selected foreigners – sympathisers with the communist regime - were allowed to reside in the country and strictly monitored. These individuals could live and move only

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Opium wars, the Taiping rebellion, the Washington treaty and the Japanese invasion of China had put this conception in deep crisis.

<sup>338</sup> 外国侨民出入及居留暂行规则 ( Provisional Rules on the Exit, Entry and Stay of Aliens in China ) 28 November 1951, Government Administration Council; 外国侨民旅行暂行办法 (Provisional Measures on Travel of Aliens in China), 10 August, Ministry of Public Security; 外国侨民居留登记及居留证签发暂行办法 (Provisional Measures on Residence Registration and the Issuance of Residence Certificate of Aliens in China), 10 August 1954, Ministry of Public Security; 外国侨民出境暂行办法 (Provisional Measures on the Exit of Aliens in China), 10 August 1954, Ministry of Public Security.

<sup>339</sup> Supra, Provisional measures on the Exit of Aliens in China, 10 August 1954, Art. 2.

within designated areas which were separate from the indigenous population. Similar to Chinese citizens, foreign nationals in the country also had to apply for a visa for the purposes of internal travel.<sup>340</sup> During the Cultural Revolution, the administration of such regulations broke down. Foreign nationals already in the country were practically forbidden to exit, while many of them were prosecuted (Liu 2011: 7).

### *13. De-securitisation of foreign migrants in China*

The shift in economic policy initiated by the Open Up and Reform policy provided new impetus for reform and the de-securitisation of international migration. In 1980, Regulations on Passports and Visas implemented a new visa system and normalised movement across the borders.<sup>341</sup> In 1983, provisional rules to attract foreign experts, especially those of Chinese ethnicity, were introduced (Ibid: 10). For the first time, China began to allow into the country individuals with different political views: while the post-1949 government had encouraged the migration of leftists, after 1978 the policy switched to welcoming as a foreign friend “anybody who was influential and might help China in some way” (Brady 2003: 196). In 1985 a Law on Control of the Entry and Exit of Aliens repealed exit visas for foreigners.<sup>342</sup> The promulgation of a law regulating the presence of foreign nationals indicates a turn from conceiving of their presence as “politically marked” and to be regulated through politics to the acknowledgement of their presence as “a normal aspect of social life” (Pieke 2012: 60). The relaxation was however gradual. In the early period of economic reforms, a special currency for foreign nationals was created (Foreign Exchange Certificate). This currency restricted foreigners to the hotels, shops and

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<sup>340</sup>外国人入境出境居留旅行管理条例 ( Regulations on the Administration of Entry, Exit, Transit, Residence and Travel of Aliens in China ) 13 April 1964, State Council, Art. 7.

<sup>341</sup>中华人民共和国护照签证条例 (Regulations on Passport and Visa of the People's Republic of China) 13 May 1980, State Council.

<sup>342</sup>外国人入境出境管理法 (Law on Control of the Entry and Exit of Aliens) 22 November 1985, Standing Committee of People's Congress.

transportation offices that accepted it (Ibid: 204). This currency was abolished in 1994 and in the early 1990s, the physical separation of foreigners from the local population gradually disappeared (Yuan-Ihle and Bork-Hüffer 2014: 515).

China's external borders underwent further liberalisation in relation to international migrants in the 2000s as both central and local governments embarked on policies aimed at attracting high-skilled foreign managers and investors (Liu 2011: 54). In 2002, the State Council issued Provisions establishing the main conditions that foreign nationals have to fulfil to be defined as "foreign talents", creating special visa to simplify entry and exit and stipulating conditions for issuing residence permits.<sup>343</sup> A permanent residence permit scheme or "green card" for foreign nationals was implemented at the national level in 2004.<sup>344</sup> However, due to its strict criteria for acquisition only 7,356 foreigners were granted the card between 2004 and 2013.<sup>345</sup> Interestingly, more than half such permits were allotted to returning overseas Chinese (Ibid). Overall, it could be argued that China's relaxation of its external borders has been to a significant extent driven by economic considerations and preferential policies for ethnic Chinese overseas. The goal of attracting high skilled foreign nationals was further pursued with the 2008 "Thousand Talents Plan" aimed at recruiting foreign

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<sup>343</sup> 关于为外国籍高层次人才和投资者提供入境及居留便利规定 (*Provisions on Providing Entry and Residence Conveniences to Foreign Highly Skilled Persons and Investors*) 29 April 2002, State Council.

<sup>344</sup> 外国人在中国永久居留审批管理办法 (Regulations on Examination and Approval of Permanent Residence of Aliens in China) 15 August 2004, State Council.

<sup>345</sup> New 'green card' to ease daily life for foreigners, China Daily, 7 February 2017

[http://english.gov.cn/state\\_council/ministries/2017/02/07/content\\_281475561294723.htm](http://english.gov.cn/state_council/ministries/2017/02/07/content_281475561294723.htm) Accessed 3 March 2017



individuals which can advance China's economic position internationally and strengthen economic and social progress internally.<sup>346</sup>

Throughout the decades, the rapid growth in the number of international migrants and the fact that regulations and rules adopted after 1985 often contradicted the 1985 legal framework and made more and more necessary a revision of the legal framework of the country's external borders. As seen earlier in the case of internal borders, political campaigns have traditionally played a key role in the implementation of China's external borders. In 2012 a campaign targeting the so called (*sanfei*) "three illegals" was launched to crack down on illegal foreigners in all China's major cities.<sup>347</sup> In Beijing, the campaign took place between May and August 2012. During this time, the police carried out random visa checks on foreign nationals in public spaces and houses and even created a hotline for the public to call and report suspicious foreign nationals.<sup>348</sup> According to some observers at the time, the crackdown on foreign nationals, similarly to the ones that preceded it, was aimed at promoting stability and stirring up nationalism in view of the 18th National Congress of the CCP, which was going to elect a new Politburo Standing Committee that year (Chodorow 2012, unpagged). As the months leading to this event had been characterised by a situation of political unease,<sup>349</sup> this campaign has been viewed by some as a politically opportunistic attempt to excite nationalistic sentiments (Ibid). Despite China's overall de-securitisation of international migration over the last three

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<sup>346</sup> 中央人才工作协调小组关于实施海外高层次人才引进计划的意见 (CCP Central Committee Small Group on the Coordination of Talent Work's Opinion on Foreign Talent Regarding Implementing the Plan of Attracting Foreign Highly Skilled Talent), CCP Central Committee, 23 December 2008.

<sup>347</sup> The three illegals consist of illegal entry, work and stay of foreign nationals in the country.

<sup>348</sup> Perhaps significantly, the campaign was proclaimed a few days after a video of an ostensibly drunk British man attempting to assault a young Chinese woman and so beaten by Chinese men went viral and stirred up xenophobic reactions from the Chinese public. Mood darkens in Beijing amid crackdown on 'illegal foreigners', CNN, 25 May 2012

<http://edition.cnn.com/2012/05/24/world/asia/china-foreigners/index.html> Accessed 21 April 2016

<sup>349</sup> These events included the fall of Chongqing party chief Bo Xilai in early 2012, the claim by his police chief, Wang Lijun, for asylum at the U.S. Consulate in Chengdu and activist Chen Guangcheng's asylum claim at the U.S. Embassy in Beijing.

decades, international migrants appear to have latently maintained one of the key functions they had during Mao's era: to embody a threat to the nation, as a tool to revive national sentiments (Brady 2003: 253).

While the excitement of nationalistic sentiments gradually blew over, the borders' enforcement drive which characterised the "three illegals" campaign was fully endorsed in the 2013 Exit Entry Law.<sup>350</sup> Before the promulgation of the 2013 Exit Entry Law, it was common practise for foreign nationals to be legally in the country on a student or tourist visa but to be in employment or doing business.<sup>351</sup> A foreign national found to be legally in the country working without a work permit did not incur strict sanctions, but instead a modest fee. The 2013 Law establishes harsher punishments for illegal stay or work in China. Foreign nationals face detention and investigation for overstaying their visas (up to sixty days if the case is complicated)<sup>352</sup> while foreign nationals working illegally may face monetary charges of up to 20,000 Yuan (twenty times more the previous penalty fine) or detention (five to fifteen days).<sup>353</sup> Foreign nationals may further be repatriated for illegally residing or working in China.<sup>354</sup> Anyone who knows of foreign nationals who have entered, are residing, or are employed illegally in China are to inform the local Public Security Bureau.<sup>355</sup>

On the other hand, the 2013 Law makes it easier for "foreign talents"<sup>356</sup> for whom a special visa was introduced and grants permanent residence to foreign nationals who make "outstanding contributions" to China or

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<sup>350</sup> 中华人民共和国出境入境管理法 (The Exit and Entry Administration Law of the People's Republic of China ) National People's Congress, July 1, 2013.

<sup>351</sup> During my years as a student in Beijing (2011-2013) this phenomenon was extremely common. Among foreign students, many would teach English as a part-time job. Some were even registered as language students but did not attend classes and simply worked full-time.

<sup>352</sup> *Supra*, footnote 350, Art. 60.

<sup>353</sup> *Supra*, Art. 80.

<sup>354</sup> *Supra*, Art. 62.

<sup>355</sup> *Supra*, Art. 45.

<sup>356</sup> *Supra*, Art. 16, 31.

“otherwise meet the requirements” for permanent residence as set by the regulations.<sup>357</sup> The goal of facilitation of entry for “foreign talents”, seen as an asset to promote China’s economic development, was further pursued in early 2016 through an Opinion which individuated the reform of the permanent residence system as the main strategy to attract more foreign talents.<sup>358</sup> The aforementioned Opinion further clarifies that in the future, the notion of foreign talent will be defined by market forces as an “essential factor” of assessment.<sup>359</sup> The same assessment orients the Pilot Implementation Plan of the Work Permit issued in late 2016, which divides foreign workers in China into three categories: foreign talents, ordinary foreigners and low-end foreigners.<sup>360</sup> As the Plan explains, the new work permit system for foreign workers is based on the principle of “encouraging high-end talents, controlling ordinary foreigners, limiting low-end foreigners”:<sup>361</sup> this principle further explains the distinction between desirable and undesirable immigrants as a tool for economic modernisation which was already hinted at in the 2013 Exit Entry Law. Although the long-term consequences of these legislative developments remain to be seen, they appear to bring China’s migration system closer to the immigration policies in Western countries (Yuan-Ihle and Bork-Hüffer 2014, Haugen 2015).

Over the last fifty years or so, China’s external border controls in relation to its own nationals have undergone some radical shifts. Within the span of a few decades the act of emigration in China has turned “from treacherous to tolerated but ideologically suspect to patriotic” (Nyíri 2002: 223). A similar path has characterised the fate of overseas Chinese, who have shifted

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<sup>357</sup> *Supra*, Art. 47

<sup>358</sup> 关于加强外国人永久居留服务管理的意见 (Opinion on Strengthening the Administration of Permanent Resident Services for Foreigners), CCP Central Committee General Office and State Council, 18 February 2016, subsection 1.

<sup>359</sup> *Supra*, subsection 3 (8).

<sup>360</sup> 关于印发外国人来华 工作许可制度试点实施方案的通知 (Pilot Implementation Plan of the Work Permit System for Foreigners) State Administration of Foreign Experts Affairs, 9 September 2016.

<sup>361</sup> *Supra*, subsection 2.

from being considered a suspicious and unreliable group during Mao's era to being patriotic vehicles of China's development in the 1990s. A similar pattern can be observed in the evolution of external borders in relation to foreign nationals who similarly went from being considered a "politically marked category of people" (Pieke 2012: 60) to being predominantly managed as an economic opportunity rather than as a threat to China's political stability as in the past.<sup>362</sup>

The de-securitisation of international migration in the PRC has been a steady process which similarly to the de-securitisation of internal borders is fundamentally linked to China's transition to market economy. As will be revealed in the next part dealing with legal categories of mobility, the de-securitisation of foreign migration has nevertheless been combined with an approach of keeping foreign nationals at arms' length rather than integrating them into society through the granting of substantial numbers of residence permits and naturalisation. Part Four, which focuses on the different legal profiles and statuses bestowed upon Chinese and foreign citizens on the move, will further substantiate these issues.

#### PART IV. LEGAL CATEGORIES

Having provided a historical overview of China's internal and external borders, which illustrated a general trend of de-securitisation of borders coinciding with China's transition to a socialist market economy, this section examines how current legal categories frame mobility and allocate different degrees of citizenship rights through which the migrant population is stratified and governed. As already posited in previous chapters, legal categorisations and different types of visas work as economic, political and

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<sup>362</sup> Even though their embodiment of a threat for China's social stability occasionally re-emerges in policy discourses, as mentioned earlier, this role appears overall secondary to their function of economic opportunity.

cultural filters through which governmental power divides and rules its population. This Part will first consider the legal categories available to internal migrants and then move to those pertaining Chinese emigrants and foreign nationals. The detailed consideration of the range of legal categories of mobility available to individuals on the move will bring me to emphasise that both in the case of China's internal borders and in the case of external borders, migrants' a high economic worth appears to be a key catalyst for the entitlement to citizenship rights.

#### *14. Rural vs urban hukou*

The first big divide of China's internal population is between those who are entitled to a *hukou* and those who are not. Without a *hukou*, Chinese citizens are a non-person in Chinese society: among those who struggle to get *hukou* are for instance children born out of China's family planning policy<sup>363</sup> or out of wedlock.<sup>364</sup> The second distinction is between urban and rural *hukou*. A local city *hukou* entitles the holder to a series of benefits not available to non-local *hukou* holders (including those who hold a *hukou* from other cities) including: free education and healthcare, subsidies for house leasing and purchasing and social security provisions. A rural *hukou* bounds its holder to the limited social services available in the rural location of registration. This aspect determines the chances of individuals to education, medical care and many other benefits. As already seen, during the first thirty years of the People's Republic the provision of the rice iron bowl of cradle to grave welfare benefits was a prerogative of urban *hukou* holders. Despite the progressive opening up of the rights to move and work across China,

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<sup>363</sup> Since 1979, the one-child policy restricts couples in urban areas to only one child (exceptions are made for couples in rural areas, ethnic minorities and couples who both lack siblings); the policy has been recently eased by a NPC Standing Committee resolution 全国人民代表大会常务委员会关于调整完善生育政策的决议 (Standing Committee of the National People's Congress Resolution about revising the child-bearing policy), 28 December 2013. [http://news.xinhuanet.com/2013-12/28/c\\_118749204.htm](http://news.xinhuanet.com/2013-12/28/c_118749204.htm) Accessed 25 April 2014

<sup>364</sup> The Dire Straits of Illegal children's *Hukou*, Xinhua news, 30 March 2014 [http://news.xinhuanet.com/local/2014-03/30/c\\_1110009695.htm](http://news.xinhuanet.com/local/2014-03/30/c_1110009695.htm) Accessed 25 April 2014

social benefits generally remain a prerogative of urban *hukou* holders. *Hukou* conversions through migration (*qianyi*) greatly vary depending on the place's settlement attractiveness: the more popular the destination, the more difficult is to obtain a local *hukou*. The most sought-after type of registration is a *hukou* from a city directly administered by the Central Government (*zhixiashi*) (e.g. Beijing, Shanghai); the second most popularly wanted is a capital city (*shenghui*) *hukou* (e.g. Guangzhou); thirdly, a prefecture *hukou* (*diqu*); a county (*xianzhen*) *hukou*; a township (*xiangzhen*) *hukou*; and at the bottom of the ladder a rural village (*nongcun*) *hukou*, normally seen as undesirable (Luo 2012: 129-30).

#### 15. Permanent vs temporary *hukou*

According to the 1958 Regulations, two types of registration for internal migrants in Chinese cities are available: permanent and temporary *hukou*. Any Chinese citizen who moves out of his or her *hukou* zone permanently needs to apply for a migrant *hukou* certificate (*qianyizheng*) from his/her local *hukou* police, cancel his/her *hukou* record and re-register at the new *hukou* zone. Such registration per se however does not provide any affiliation or rights in the receiving place. Permanent *hukou* (*changzhu hukou*) is what could be compared to the nationality/citizenship of a person, in that it is inherited at birth and can only be converted in specific circumstances. Those who live outside of their permanent area of *hukou* registration for more than one month are further required to obtain a temporary residence permit in the place of destination (*zanzhu zheng*).<sup>365</sup> This permit is valid for six months (up to a year if necessary) and can be renewed at the local *hukou* police station. While this permit can be compared to a short-term visa and as shall be seen in detail in the case of Beijing, its implementation is currently discontinuous and ad hoc. Temporary residence permits are the main arrangement for most of China's internal migrants to legally reside in cities. Based on whether

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<sup>365</sup> 暂住证申领办法 (Methods to obtain temporary residence permit), 2 June 1995, State Council, Art. 3.

a local *hukou* is granted by the receiving city as a result of rural to urban migration, two categories of migration can be identified. The first one entails a formal transfer of *hukou* and is officially considered as migration (*qianyi*) and the migrant is provided with state resources at her destination (Buckingham and Chan 2008: 590). The second one does not involve any *hukou* change nor a permanent right of residence at destination and is not defined as migration but rather a mere movement of population, or more precisely, a “floating of the population” (*renkou liudong*) (Ibid). As the term “floating” suggests, most of China’s internal migrants are considered transient in cities. While, as the appellation suggests, theoretically the floating population would not be authorised to permanently live in the city of destination, most of China’s internal migrants spend years in the urban areas and often establish themselves there permanently (Ibid).

#### 16. *Hukou conversions*

As mentioned earlier, a permanent city *hukou* entitles its holder to a series of benefits not available to non-local *hukou* holders, including: free education and healthcare, subsidies for house leasing and purchasing, social security provisions and so on. Taking education as an example, local schools are free for local *hukou* holders but come at high fees for non-local *hukou* holders.<sup>366</sup> It should also be noted that large cities are the ones with the best services and facilities. One of the most noteworthy privileges which *hukou* holders of large cities such as Beijing and Shanghai retain over *hukou* holders of other localities is their precedence in college admissions. Given the system of different admission scores for *hukou* holders of different regions in the college entrance examination, the chances of being accepted by a top university are considerably poorer for *hukou* holders of localities outside large cities (Wang 2005: 68, 139-149). As already mentioned, a quasi-

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<sup>366</sup> In addition, children who are non-local *hukou* holders are required to return to their permanent *hukou* location to take part in the college entrance examination, which is generally more competitive outside the big cities (Wang 2005: 67).

permanent way to obtain local *hukou* in large cities is the blue seal *hukou* (*lanyin hukou*), a transitional residence permit reserved for a few highly skilled or flat buyer migrants, convertible to a permanent local *hukou* after some years of regular residence. This scheme and such statuses are set by local governments. This scheme – whose minimum requirements of access are wealth or skills are established by local governments - has allowed cities such as Beijing and Shanghai to grant permanent residence to a few wealthy and high-skilled individuals while maintaining the rest of the migrant population outside of social rights recognition if not out of the cities. Although permanent residents of big cities, the only legal recognition most internal migrants can achieve in a big metropolis such as Beijing or Shanghai remains a temporary residence permit.

While the specific conditions for *hukou* conversion vary in different localities and are more restrictive in big cities, based on internal documents, evaluation reports and fieldwork observation, Wang has individuated general features and categories of *hukou* relocation (Wang 2005: 91-101). Two traditional ways of *hukou* relocation are state employment and working in the army (Ibid: 91-2). A third category of mobility is that of “the powerful”, which is, retired state cadres and their families, who can resettle in any desired location (other than Beijing); a Beijing *hukou* is instead available at all times to party and state leaders in the highest ranks of the central government and their families (Ibid: 92). Two other categories of mobility since the 1990s – attainable through a blue-seal *hukou* – are as already mentioned “the wealthy” (which include purchasers of real estate property, high-paid workers, self-employed businessmen and investors) as well as the “educated or talented” (Ibid: 92-3). At present, college graduates are commonly guaranteed urban *hukou* upon graduation in mid-sized cities while PhD degree holders are permitted to relocate their *hukou* to a city of choice



even if they do not have a local job (Ibid: 94).<sup>367</sup> Another category of mobility is the “second generation relocated”. Although, even more strictly than national citizenship policies, a *hukou* cannot ordinarily be acquired through marriage, since 1998 the child of a rural-urban or inter-regional couple can decide whether to inherit a mother’s or a father’s *hukou*.<sup>368</sup> Finally, *hukou* relocation might take place in the case of “owners of land development areas”, which is, rural *hukou* holders whose land is taken over by the state for urbanisation and economic development (Ibid: 96). It should be noted that until today, *hukou* conversions are rare. The majority of China’s internal migrants living in China’s largest cities remain unable to convert a native *hukou*. In terms of their legal status, they either live in cities as temporary *hukou* holders or as unregistered floaters.

### *17. Irregular internal migrants*

As mentioned above, the largest part of the floating population lacks a permanent legal status in cities. Wang further estimated that in China's biggest and best managed metropolises more than half of the migrant population lives without any temporary registration (Wang 2005: 78). While during planned economy the system of food rations and assigned jobs in cities combined with the communes in rural areas made it very hard for a rural migrant to move without authorisation to urban centres, the transition to a market economy system changed the rules of the game. Progressively, unauthorised mobility across internal borders became a widespread practice which was both of concern for the government and at the same time greatly

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<sup>367</sup> Except for Beijing, where local employment remains a requirement for a PhD holder to apply for a local *hukou*.

<sup>368</sup> 国务院批转公安部关于解决当前户口管理工作中几个突出问题意见的通知 (Notice of Opinions of the Ministry of Public Security on Solving Several Current Prominent Problems on Hukou Management with approval of the State Council) 23 June 1998, Ministry of Public Security. In the past, the child of a mother with rural *hukou* inherited her rural status regardless of their father's *hukou*. Even when born in a city to a father with urban *hukou*, the child had no right to schooling or food staples in the city. In spite of China's patrilineal tradition, by tying *hukou* registration to female lineage the State was determined to keep the urban population low (Davin 1999: 6).

benefited the growing urban economies fuelling China's growth. This initially ambivalent attitude is reflected in the lack of rigorous and consistent implementation of China's internal border controls documented by various studies (Xiang 1997, He 2003, He 2005). Whenever the growth of migrant populations in large urban centres was not needed, local governments have occasionally launched political campaigns, with the purpose of "cleaning up and reorganising" (*qingli zhengdun*): to fight unregistered migrants, unauthorised migrant-owned businesses and housing compounds (He 2005: 534). Nevertheless, due to the transitory nature of the campaigns irregular migrants normally left the city when the campaign was at its peak and returned when it came to an end (Solinger 1999: 69). As already mentioned, detention and repatriation measures for internal migrants caught without papers were repealed in the law in 2003 following the outcry of the *Sun Zhigang* case. Yet, the practice of random ID papers checks and forced repatriation for undocumented migrants still occasionally occurs in major cities (Wang 2010: 92). Moreover, sporadic campaigns for the purpose of "cleaning up and reorganising" unregistered migrants in cities such as Beijing are known to take place annually during politically sensitive times, such as on the anniversary of the 1989 Tiananmen events (June 4<sup>th</sup>), on China's national anniversary (October 1<sup>st</sup>), and when the National People's Congress is in session in March each year (He 2005: 534). This sporadic enforcement of the legislation of China's internal borders encourages situations of semi-legality, whereby migrants are not fully legal nor illegal (Ibid).

Research conducted among business migrant communities in Beijing has revealed that at times, semi-compliance is the optimal situation for migrant entrepreneurs as legal compliance has too high a price for some migrants; this would be the result of a complex game of collusion of migrant entrepreneurs and local authorities, profiting from migrants' situation of

semi-compliance (He 2005).<sup>369</sup> Research I conducted with a colleague in Beijing further shows that currently *hukou* laws are observed only when non-compliance with them has some practical consequences (Fu and Pasquali 2015). Remarkably, such lack of compliance does not call into question moral principles or a criminalisation of irregular migrants as *hukou* legislation appears to be followed out of practical considerations (Ibid).

### *18. Targeted population*

Apart from managing China's internal migration, another crucial - although less known - aim of China's *hukou* system has been the control of the so called "targeted people" (*zhongdian renkou*) for maintaining social stability and combating crime. Modelled on a Qing Dynasty's *hukou* practice, the monitoring of specific target groups has been key in the consolidation of the new post-1949 regime (Wang 2004: 103). This close monitoring of targeted individuals enabled the government to individuate, monitor and rectify political opponents. Apart from the police, it was significantly carried out through a net of politically inspired activists-informants, known as "the eyes and the ears" of the *hukou* system (Dutton 2005: 289). These individuals covertly monitored those considered politically suspect, gathering information about them and adding it to their *hukou* details and reporting anything suspicious to the police (Ibid: 288-9).

The practice of monitoring the targeted population, which used to include a periodically updated blacklist, was formalised at the end of the 1950s and revised in 1980 when a new blacklist targeted four types of residents: suspected of counter revolutionary actions, suspected of other criminal activities, suspected of threats to the public order, and suspicious

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<sup>369</sup> In analysing why most rural-urban migrant entrepreneurs in Beijing do not fully comply with license requirements but prefer license-renting from locals, He identifies, together with law's lack of legitimacy, the fact that license-renting is protected and sustained institutionally by local businesses, law enforcement officers, and the local authorities, whose interests are entwined with it (He 2005: 527).

ex-prisoners (Wang 2004: 127). In the early 2000s, as many as 300,000 *hukou* police officers were in charge of collecting information on each resident locally.<sup>370</sup> With the transition to a market economy, the system of activists-informants evolved from being a net of politically inspired “eyes and ears” monitoring political conduct to a system of “dubiously motivated hired help” mainly watching criminal offenders (Dutton 2005: 289). The Ministry of Public Security occasionally sends instructions to the *hukou* police nationwide on who should be classified as targeted people and requires monitoring them accordingly (Wang 2004: 125). Particularly during political campaigns to strike hard against crime, both targeted people and undocumented migrants may be preventively put into detention or undergo interrogations without evidence of criminal activities (Ibid: 125-6). While there have been reforms and a general relaxation in the management of China’s internal migration, the management of the targeted people is still “highly centralised, rigid and forceful” (Ibid: 116).

### 19. Chinese overseas

As mentioned in Part Three, the right to leave and return to China is currently granted to all Chinese citizens, yet it is still restricted for certain categories such as members of minority groups suspected of separatist claims (e.g. Tibetans and Uighurs), individuals without a *hukou*, and political dissidents (Chodorow 2015, unpagged). The category of overseas Chinese encompassed by the notion of *huaqiao* blends with distinctions between nationals and foreigners as the term includes both Chinese citizens abroad and foreign nationals of Chinese descent living abroad. Although for the

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<sup>370</sup> As Wang explains, resident information divides up into eight categories, including: basic information present on the *hukou* registration form, behaviour and political activities, personal financial status and way of life; friends and relationships; physical appearance, use of accent, personality and interests, daily relations and relevant past activities. For example, in Beijing the *hukou* police collects only the basic information and current behaviour of general residents but gathers all eight categories of information regarding the targeted people and monitors them closely (Wang 2004: 124-125).

purposes of legislation the latter count as foreign nationals, I have already mentioned how foreigner of Chinese descent have also been the target of various preferential policies at both national and local level, such as through the introduction of permanent residence permits for talented Chinese overseas in cities such as Shanghai and Beijing.<sup>371</sup> Such policies reflect a governmental rationale which collapses national belonging with a specific ethnic group and illustrates the underlying preference for mono-ethnicity upon which the project of the Chinese state appears to be based.

#### *20. Foreign nationals: short vs long term*

For stays of less than a year, foreign nationals in China are required to obtain a visa and a temporary accommodation registration. For stays of a year or longer, a residence permit is needed.<sup>372</sup> The validity period of a foreigner's work-type residence permit is 90 days at the minimum and five years at the maximum, while the validity period of a non-work-type foreigner's residence permit is 180 days at the minimum and five years at the maximum.<sup>373</sup>

#### *21. Family members*

Foreign nationals who are family members of Chinese citizens, permanent residents or work permit holders have a right to family reunification. In the past, spouses of Chinese citizens and foreign nationals had to be married for five years and had to have lived in China for five years before receiving permanent residence.<sup>374</sup> Those who did not meet the requirement had to rely on continually renewing their tourist visa to be legally in the country. After the 2013 *Law*, relatives of Chinese citizens or

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<sup>371</sup> Capital aims to woo more top-level foreign workers, China Daily, 13 January 2016

[http://www.chinadaily.com.cn/china/2016-01/13/content\\_23058308.htm](http://www.chinadaily.com.cn/china/2016-01/13/content_23058308.htm) Accessed 13 April 2016

<sup>372</sup> *Supra*, footnote 350, Art. 16.

<sup>373</sup> *Supra*, footnote 350, Art. 30.

<sup>374</sup> Regulations on Examination and Approval of Permanent Residence of Aliens in China (外国人在中国永久居留审批管理办法), 15 August 2004, State Council, Art.6.

foreign residents applying to reside in China for more than 180 days are eligible for residence permits which are valid for up to 5 years.<sup>375</sup> Individuals on this type of permit are not allowed to work. Family members of a foreign national with a work permit can similarly obtain a residence permit as long as their work permit type allows it. It should be noted here that in contrast to this, similar provisions for family reunification are instead inexistent for the internally floating population. As seen earlier, an example for that is the lack of access to free education for non-local *hukou* children, which often forces migrant parents to leave their children behind in the rural areas.

## 22. *Citizenship acquisition*

As far as the acquisition of Chinese citizenship goes, Chinese nationality law follows the principle of *jus sanguinis*. According to the 1980 *Nationality Law*, a child born in China is a Chinese citizen if at least one of the parents is a Chinese national, or if the parents are settled in China and they are stateless or their nationalities cannot be determined.<sup>376</sup> A child born abroad with at least one Chinese citizen parent is a Chinese citizen, unless the Chinese parent is settled in a foreign country and the child has acquired foreign citizenship at birth.<sup>377</sup> As already mentioned, China does not allow dual nationality.<sup>378</sup> Under the 1980 *Law*, a foreign national or stateless person who is willing to abide by China's Constitution and laws and who is a close relative of a Chinese national, has settled down in China, or has "other legitimate reasons"<sup>379</sup> may be naturalised as a Chinese citizen.<sup>380</sup> The naturalisation of foreign nationals has been extremely uncommon and has been granted to very few foreigners since the inception of the People's

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<sup>375</sup> *Supra*, footnote 350, Art. 30.

<sup>376</sup> 中华人民共和国国籍法(Nationality Law of the People's Republic of China), National People's Congress, 10 September 1980, Art. 4.

<sup>377</sup> *Supra*, Art. 5.

<sup>378</sup> *Supra*, Art. 8.

<sup>379</sup> The term "legitimate reasons" is not further specified in the 1980 Nationality Law, since each local government has different requirements.

<sup>380</sup> *Supra*, Art. 7

Republic in 1949. The 2010 five-yearly national census counted only 1,448 naturalised citizens in the whole of the country.<sup>381</sup>

Apart from a deliberate governmental will to keep foreigners at arms' length, it could be speculated that the prohibition of dual citizenship is a deterrent in a few respects. First, relinquishing one's own citizenship implies having to apply for a visa each time one enters one's own country of birth. Second, for those foreign nationals who are passport holders of states which enable more visa-free international travel than a Chinese passport does, Chinese citizenship might not be convenient. According to this logic, within the global hierarchy of passports' mobility, the only foreign nationals who may have an interest in acquiring Chinese citizenship would possibly be those from countries for whom Chinese citizenship represents an "upgrading" over their current citizenship.

### *23. Foreign workers*

At the national level the employment of foreign nationals is regulated by the 1996 *Provisions on the Administration of the Employment of Foreigners*.<sup>382</sup> To apply for a work permit, applicants need to have "the professional skills and job experience required" for the intended occupation.<sup>383</sup> Work visas are reserved for posts for which employers have a "special need" and cannot find local candidates for the time being.<sup>384</sup> This vague guideline is interpreted differently in various locations. While mid-size or small localities tend to have low requirements, in cities such as Beijing and Shanghai the bar for

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<sup>381</sup> The 2010 China Population Census for the first time covered the count of foreign nationals in China (along with residents from Hong Kong, Macao and Taiwan).

[https://web.archive.org/web/20110514214156/http://www.stats.gov.cn/english/newsandcomeingevent/s/t20110429\\_402722638.htm](https://web.archive.org/web/20110514214156/http://www.stats.gov.cn/english/newsandcomeingevent/s/t20110429_402722638.htm) Accessed 13 April 2016

<sup>382</sup> 外国人在中国就业管理规定 (Regulations on the Management of Employment of Foreigners In China), 1 May 1996, Ministry of Labour, Ministry of Public Security, Ministry of Foreign Affairs and the Ministry of Foreign Trade and Economic Cooperation

<sup>383</sup> *Supra*, Art. 7

<sup>384</sup> *Supra*, Art. 6

national requirements is higher. The abovementioned pilot legislation on work permits implementing the 2013 Law is currently being experimented with at the local levels and takes further steps to promote the immigration of talents and high-level workers. As seen earlier, the 2016 Pilot Plan introduces a three-tiered classification (foreign talents, normal foreigners and low-end foreigners) reflects the different attitudes towards the immigration of foreign workers according to the supposed economic value that they can bring to the country.<sup>385</sup> In the case of class A foreign talents, in order to attract them the government does not impose any quota on work permits;<sup>386</sup> in the case of class B, the government allocates and regulates the quotas according to the current market demands;<sup>387</sup> in the case of class C, the government strictly controls the quotas.<sup>388</sup>

#### *24. Irregular foreign migrants*

While China's legal framework of external borders encourages the entry and residence of high waged workers, a number of more "indeterminate" categories of international migrants who enjoy fewer legal protection or no rights at all exist in the Chinese context (Zhu and Price 2014: 6). One is that of international small-scale traders, engaged in small scale retail as well as wholesale export/import of Chinese goods to international markets.<sup>389</sup> As

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<sup>385</sup> *Supra*, footnote 360.

<sup>386</sup> Examples of class A workers include: winners of specific awards in academia, arts, entertainment, business or sports, top positions holders in business, academia, sports or entertainment, entrepreneurial or innovative talents, "outstanding" and young talents with PhD degrees or higher from a top 200 University or a Chinese University, former managers at a top 500 company. *Supra*, pp.7-11.

<sup>387</sup> Examples of class B workers include: holders of a minimum of bachelor's degree combined with two years of work experience, master degree holders of a top 100 university, previous holders of job posts at certain foreign organisations, foreign language teachers with a bachelor degree and two years' work experience in the field of education. *Supra*, pp.11-12.

<sup>388</sup> Class C workers include whoever does not score enough points to fall within the A or B category. *Supra*, pp. 12-13.

<sup>389</sup> Many of these migrants are based in Guangzhou - China's main export hub - and mostly come from African countries. Different from other categories, their migration pattern is not linear: while



the current visa policy only allows work visas for migrants who are employed by a registered company, these traders work in the country by periodically renewing short-term business, student or tourist visas. However, visa extensions may often be denied by the local authorities (Zhu 2014, Haugen 2012). As a result, some of these traders end up being “trapped” in China following the expiration of their visas, as applications for exit visas for over-stayers must be submitted with housing registrations, which requires valid travel documents. This situation has been defined as a “second state of immobility” where individuals who have managed to emigrate once “end up becoming spatially entrapped in new ways in the destination countries” (Haugen 2012: 66).

While traders and self-employed migrants juggle provisional legal categorisations, other groups of migrants are completely left out of the legal frameworks. This is the group of undocumented workers, most of them “smuggled” from neighbouring countries such as Vietnam, Cambodia and Laos. Many of these migrants are employed in factories in Southern China, where the once abundant supply of cheap domestic labour is shrinking.<sup>390</sup> Others are employed as caregivers and domestic helpers, which are in high demand among middle class white collar families in China’s largest metropolises.

Despite being the latest enablers of the competitiveness of many Chinese factories and businesses, these foreign workers are barred from any sort of legal recognition by their low-skilled work, similar to the situation of China’s rural migrants. The condition of irregularity is variably experienced in different locations across China. As seen earlier in this chapter, legislation is unevenly carried out among different administrative levels and authorities in

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many might only visit China a few times a year, others are permanently based in China (Castillo 2014: 238).

<sup>390</sup> Special Report: How smuggled workers power 'Made in China', 6 August 2015 <http://www.reuters.com/article/us-china-labour-illegal-special-report-idUSKCN0QB00H20150806>  
Accessed 21 April 2016

China and greatly varies according to the location where a foreign national resides. As a result, provinces and local governments may pass more restrictive legislation than the one existing at the national level, or else, local funding arrangements may hinder the uniform implementation of the law, as the budget for the police to implement immigration policies depends on local governments (Haugen 2015).

## *25. Lack of a category of humanitarian protection*

While presently legal migration into the EU is mainly framed through the category of humanitarian protection, as anticipated in this chapter's introduction to the legal system, in China this legal category is practically non-existent.<sup>391</sup> In principle, China accepts asylum seekers and in 1982 signed the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol. In practice however, China never had an institution to process asylum seekers and does not provide any assistance to asylum seekers or refugees in the country.<sup>392</sup> As a result, an individual seeking shelter from political prosecution in China will probably do so by presenting herself as a tourist or a labour migrant as humanitarian protection is not an option on the legal spectrum. This lack of humanitarian assistance relates to China's long-standing commitment to non-interference in other states' internal affairs. The 2013 Exit Entry Law appears to have taken steps to introduce such category by announcing measures for asylum seekers, allowing them to stay in China during the processing of the applications.<sup>393</sup> Yet, this provision is not enforceable until specific regulations and rules for implementation are promulgated.

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<sup>391</sup> As of December 2015, the total population of concern in China - comprising both refugees and asylum seekers - was 301,622, out of which 300,895 were from neighbouring Vietnam and had fled to China during the 1979 Sino-Vietnamese war. UNHCR People's Republic of China Fact Sheet, December 2015, <http://www.unhcr.org/5000187d9.pdf> Accessed 13 April 2016

<sup>392</sup> The Beijing office of the United Nations High Commissioner for Refugees (UNHCR) carries out refugee status determination on behalf of the Chinese government.

<sup>393</sup> *Supra*, footnote 350, Art.46

As this Part demonstrated, China's borders greatly vary for different categories of people. As far as internal borders are concerned, while *hukou* conversions and resident permits are granted to some privileged categories and largely oriented by an evaluation of migrants' economic worth, most of China's internal migrants are still referred to as a "floating population", residing in cities without a permanent legal status. Remarkably, the status of irregularity, which possibly characterises most of China's floating population, has ceased to retain criminal or moral repercussions on the lives of internal migrants. I further mentioned the category of the "targeted people" as one which remains strictly monitored by the government despite the general relaxation of China's internal borders. I then examined China's shifting external borders. I observed that apart from a few exceptions, at present Chinese citizens enjoy freedom of movement across international borders and that the Chinese diaspora is a target group whose immigration is promoted through preferential residence policies. As far as foreign nationals are concerned, I have noted China's efforts to attract the immigration of talents and high-waged migrants to promote economic development. I further explained how current legal categories leave other segments of the migrant population in an indeterminate state of semi-legality or illegality. While the latest legislative developments appear to expand legal pathways to permanent residency for foreign nationals, it was noted that these pathways only target high skilled migrants and huge differences in treatment exist for different groups of international migrants based on their presumed economic worth. Although important, the management of international migration is derisory when compared to the numbers of internal migrants, which remain China's top priority. In order to better understand the current trend of de-securitisation of migration in the Chinese context, the next section moves to the investigation of China's internal borders in the case of Beijing.

## PART VI. CHINA'S INTERNAL BORDERS CLOSE UP: BEIJING

### 26. *Historical outline*

Beijing is significant for this narration of China's internal borders as it is the city with the most sought-after *hukou* and the strictest *hukou* legislation in the whole of China. While the main piece of law establishing the *hukou* system was introduced nationally in 1958, residence controls in Beijing started much earlier and were harsher in China's capital. Prior to the 1958 Regulations, in 1953 a local regulation mobilized thousands of people, including farmers, soldiers and unemployed workers to leave Beijing and go back to their hometowns.<sup>394</sup> In 1957, further Instructions on Preventing the Blind Outflow of Rural Population were issued in Beijing.<sup>395</sup> Luo has distinguished three phases of the history of the management of human mobility in Beijing (Luo 2012). The first phase goes from 1949 to 1958 and is characterised by freedom of movement. Within only a decade the population of Beijing experienced an increase of 4.287 million, two thirds of its size (Ibid: 22). At the same time, the *hukou* system served as an instrument for the purposes of political control, to disclose and prevent the antagonism of counter-revolutionaries: for example, between 1949 and 1950, 13,704 opponents and more than 24,000 "questionable persons" were caught through *hukou* registration and verification in the capital (Wang 2005: 44).

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<sup>394</sup> 北京市人民政府关于农民盲目流入京市情况和处理措施向华北行政委员会、政务院的报告 (Beijing Municipal Government's Report to the North Administrative Committee, the Council regarding to the Situation and Measures responding to the Inflow of Rural Population) in 北京市档案馆, 中共北京市委党史研究室(Beijing Municipal Archives and Beijing Party Committee Research Office edit), 北京市重要文献选编 1955 (*The Important Literature Compilation of Beijing 1955*) 中国档案出版社 (China Files Press) 2003 pp. 113-115.

<sup>395</sup> 关于制止农村人口盲目外流的指示 (Instructions on Preventing the Blind Outflow of Rural Population), the Central Committee of the Communist Party of China, the State Council, 劳动期刊 Labour Journal 1958.1, p.22.

At the second stage, the separation between urban and rural *hukou* was enforced and substantial increases in the size of the population led the local government to implement new regulations. However, strict controls were not always implemented in Beijing: for example, under the economic enthusiasm of the Great Leap Forward,<sup>396</sup> in 1959 the Beijing government set aside the national *hukou Regulations* to allow urban enterprises to recruit cheap rural labour.<sup>397</sup> The following year the government changed its attitude back to strict control. Until 1970, the control of the migrant population was so strict that Beijing's population only grew by 502,000 people within 8 years of negative population growth.<sup>398</sup> In Beijing as in other cities, the local population was further sent to rural areas through administrative methods. Movement into the city was also administratively planned. At the time, of those who legally migrated to Beijing, 63% were approved by the government, 24% by institutions of higher education, 10% by the military and merely 3% by the *hukou* police (Luo 2012: 25).

The year 1978 initiated a third stage of *hukou* regulation following the Open up and Reform policy, which continues until the present day. As the demand for labour force increased in Beijing, the practice of rural workers entering the cities began to be permitted and was subsequently recognised by the central government in the mid-1980s. In 1985, the Beijing government issued Regulations which required the migrant population in the city to obtain a temporary residence permit.<sup>399</sup> Remarkably, since the mid-1990s non-local *hukou* residents have made up one-fourth of the Beijing

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<sup>396</sup> The Great Leap Forward was a political campaign which lasted from 1958 to 1961. Its aim was to transform China from a predominantly rural economy into a socialist society through fast industrialisation and collectivisation. The campaign had devastating effects on the rural population and is considered to be the cause of the Great Chinese Famine.

<sup>397</sup> Luo 2012 p.25.

<sup>398</sup> 《当代中国》丛书编辑委员会编, 中国社会科学出版社 1989 年版, ("Contemporary China", edited by the editorial board of Contemporary China Collections, China Social Sciences Press 1989) pp.401-402.

<sup>399</sup> 关于暂住人口户口管理的规定 (Regulations on the Hukou Management of Temporary Residence) 26 November 1985, Beijing Municipal Government.

population. At the beginning of 2016, out of a registered population of over 21 million, non-Beijing *hukou* registered residents amounted to over 8 million and accounted for 37.9% of all Beijing residents.<sup>400</sup>

## 27. *Legal categories of migration*

A Beijing *hukou* is key to accessing a host of benefits: free schooling and easier access to prestigious universities, high quality healthcare and access to many job openings reserved for Beijing citizens. Despite paying taxes, the migrant population is not entitled to these benefits, nor can its members participate in the election of the Community Residential Committee (*julihui*) (Ibid: 43). According to the Regulations in force, all migrants whose period of stay in Beijing exceeds one month, and people who come to work or do business in the capital, shall make a temporary residence registration and apply for a temporary residence permit (*zanzhu Zheng*).<sup>401</sup> There exist three categories of temporary permit: type C, allowing a length of less than a year for the purposes of business or engaging in work or business activities; type B, for individuals in Beijing for one to five years; type A, which grants temporary residence for more than five years if the person meets certain requirements (working for a high-tech enterprise; investing more than 300,000 Yuan in the city; accessing the city with an honorary title or as an outstanding personnel).<sup>402</sup> The most common among temporary permit holders is the type C permit, which according to a municipal regulation is to be renewed every year at the cost of 5 Yuan. Interestingly, in the past, different districts in Beijing implementing this rule have imposed extra fees which could raise the cost of the permit to as much as 200 Yuan (adding

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<sup>400</sup> 《2015 年末北京常住人口达 2170.5 万人》(At the end of 2015 Beijing population reached 21 million and 705 thousands), 北京青年报 (Beijing Youth newspaper) 20 January 2016, [http://news.xinhuanet.com/house/bj/2016-01-20/c\\_1117828550.htm](http://news.xinhuanet.com/house/bj/2016-01-20/c_1117828550.htm) Accessed 20 March 2016.

<sup>401</sup> 北京市外地来京人员户籍管理规定 (Beijing regulations on the management of migrant labourers household registration), 31 December 1997, Beijing Municipal Government, Art. 7.

<sup>402</sup> 暂住证种类 (Types of Temporary Residence Permit) 17 July 1997, Beijing Municipal Bureau of Public Security.

levies for accidental injury insurance, a public welfare development fee and even a requirement to make blood donations, only avoided upon payment of pecuniary “offers”).<sup>403</sup>

In October 2001, the municipal government established a selective scheme to grant blue-seal *hukou* to allow certain categories of migrants to become permanent residents in Beijing. For a set of three urban *hukou* (self, spouse, and one child) a private entrepreneur had to have contributed more than three million Yuan as a total three-year tax payment and had to hire a minimum of a hundred local workers (or 90% of his/her employees had to be Beijing *hukou* holders) (Wang 2005: 189). Such conditions restricted the possibility of obtaining a blue seal *hukou* to multimillionaires. Interestingly, more than two months after the promulgation of this law, only one business owner had qualified for it (Ibid). As in other cities, Beijing has similarly connected the purchase of real estate with *hukou*. In the mid-1990s, a house-purchasing scheme, subject to the annual migration quota, was in place and granted a set of three Beijing urban *hukou* to purchasers of high-end real estate in selected areas at a minimum market price of 500,000 Yuan, fifty times the average annual income in Beijing (Ibid). This policy was annulled in 2005 as the acquisition of *hukou* by real estate purchasing disproportionately raised the real estate price in Beijing.

According to current regulations, a non-local *hukou* holder cannot buy a flat without having paid taxes in Beijing for more than five years, can buy no more than one apartment,<sup>404</sup> and can only obtain loans and mortgages at

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<sup>403</sup> 有地方巧立名目乱收费-京城暂住证收费情况调查 (Illegal Fees Collection Under False Pretense-Investigation on Fee Collection of the Temporary Residence Permit in Beijing), Southern.com, 7 April 2002, <http://www.southcn.com/news/china/china07/200204070048.htm> Accessed 13 August 2013

<sup>404</sup> 北京市人民政府办公厅关于贯彻落实国务院办公厅文件精神进一步加强本市房地产市场调控工作的通知 (Notice of Further Strengthening Regulating of the Real Estate Market in order to Implement Documents of the State Council) 15 February 2011, General Office of the Beijing Municipal Government.

very high rates.<sup>405</sup> Scandals of illegal sale of Beijing *hukou* by government officials, belonging to the limited governmental quotas (15,000 per year) yearly allocated to some work units were also reported (Wang 2010: 96). At the same time, the city has continued to try to attract talented and highly educated persons. For example, PhD holders with a job in Beijing can apply for a Beijing *hukou* within the quotas. Moreover, in line with the policy of promoting the entry of talents, since 2016 a new Talent Scheme to attract high-level talent to Beijing allows non-local *hukou* internal migrants and returning Chinese overseas graduates employed in hi-tech start-ups to obtain a Beijing *hukou*.<sup>406</sup> As seen in Part Two above, this measure is in line with the central government's 2014 Instructions to maintain strict control over China's megacities while promoting the settlement of a few selected categories of migrants.

## 28. Borders' enforcement

While in the past the local police was traditionally in charge of implementing *hukou* regulations in Beijing for the preservation of the social order, at present controls are mostly related to the levying of fees and have increasingly shifted to institutions distributing licenses or permits, such as the Industry and Commerce Bureau, the Housing and Land Bureau and the Birth Control Committee (He 2003: 188). For instance, the Industry and Commerce Bureau has an active role in regulating migrant business activities, monitoring streets and checking street vendors' licences, granting licences and collecting fees.<sup>407</sup> Another crucial control agent is the Housing and Land Bureau, as a 1987 Regulation prescribes landlords wanting to rent

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<sup>405</sup> 北京市人民政府贯彻落实国务院关于坚决遏制部分城市房价过快上涨文件的通知 (Notice of Implementation of State Council's Documents on Strict Control of the Rising House Prices) 30 April 2012, Beijing Municipal Government.

<sup>406</sup> Capital Aims to woo more top-level foreign workers, China Daily, 13 January 2016, [http://www.chinadaily.com.cn/china/2016-01/13/content\\_23058308.htm](http://www.chinadaily.com.cn/china/2016-01/13/content_23058308.htm) Accessed 13 April 2016.

<sup>407</sup> 北京市外地人员经商管理办 (The Management Measures on Migrants Conducting Business in Beijing) 1 March 1993, Beijing Municipal Government.



their properties to migrants to apply for rental permits from the Bureau.<sup>408</sup> Furthermore, the Birth Control Committee, in charge of enforcing the child policy on non-Beijing hukou residents, prescribes that once in Beijing, married women have to apply for a new marriage and fertility certificate from the Bureau. Without it, they are not allowed to apply for any other type of permit.<sup>409</sup> A study has shown that these bureaus have often been competing in levying the part of regulation fees or sanctions which do not go to the national government, leading to a sporadic and inefficient enforcement of the legislation (He 2003: 192).

As various studies have demonstrated, the enforcement of *hukou* regulations in Beijing has been uneven (Xiang 1997, He 2003 and 2005, Wang 2005). A study a colleague and I conducted exploring the implementation of temporary residence permits in Beijing, the most common permits available to internal migrants, corroborates this picture of uneven implementation (Fu and Pasquali 2015). Our interviewees confirmed that to this day, during official events taking place in Beijing the police or their intermediaries may check ID cards or permits on means of transports and public places (Ibid: 277). Apparently, the only situation within which someone can still be repatriated is when a non-Beijing *hukou* holder, not carrying his/her ID card, and, not remembering his/her ID number, is subsequently found without any temporary residence permit. Interestingly, only half of the non-local *hukou* interviewees believed that a temporary

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<sup>408</sup>关于加强暂住人员租赁私有房屋管理的规定 (Regulation on Strengthening the Control of Private Rental Housing to Temporary Residents) 15 August 1987, Housing and Land Bureau, Beijing. Such regulation has been amended by 北京市房屋租赁管理若干规定 (Several Provisions of Beijing Municipality on House Lease Administration), Beijing Municipal People's Government, 5 May 2011.

<sup>409</sup>北京市外地来京人员计划生育管理规定 (Measures on Temporary Residents' Birth Control in Beijing), 13 June 1995, Beijing Municipal Government. The regulation prescribed non Beijing *hukou* females to obtain and always bring with them a certificate of marriage and fertility (from the government of their original *hukou* registration), documenting their fertility history and present contraceptive measures. This regulation is now invalid as it has been replaced by 北京市流动人口计划生育管理规定 Provisions of Beijing Municipality on Administration of Family Planning among the Floating Population, Beijing municipal government, 5 November 2011.

residence permit is required to live and work in Beijing. A temporary residence permit may still be required by the employer of a specific profession or business as well as by landlords (Ibid: 278). Some interviewees further clarified that in the past they had to obtain it for specific reasons (e.g., in order to get a driving license) but at that time they did not have one as it was simply not needed (Ibid). The confusion around the implementation of temporary residence permits in Beijing appeared to be clarified by a semi-official website explaining that since 2009 this permit would have lost mandatory nature and instead follows a “voluntary principle” (Ibid).<sup>410</sup> According to recent news reports Beijing is to gradually implement a residence permit system, however, the latter presently remains at a trial stage.<sup>411</sup> In all, the implementation of *hukou* legislation in Beijing appears very much ad hoc and in a phase of experimentation. The notion of compliance to *hukou* regulations on a “voluntary principle” basis appear to confirm the notion of instrumentalism of law in the field of *hukou* legislation.

Over the last 60 years or so, *hukou* legislation in Beijing has undergone substantial changes. Internal borders in China’s capital have considerably shifted from a function of political control to one of population management. As in the rest of the country, the opening up to a market economy has eased mobility across them. Nevertheless, criteria for the acquisition of a Beijing *hukou* remain very strict and leave the largest majority of migrants in a permanently temporary legal status, no matter how long they have resided or worked in the capital. Remarkably, even in the city with the most sought-after *hukou* and with the strictest *hukou* legislation in China, the implementation of *hukou* regulations is sporadic and seemingly ad-hoc.

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<sup>410</sup> 北京居住证 (Beijing Temporary Residence Permit), Beijing Network, <http://ldjy.beijing.cn/bjzzz/index.shtml> Accessed 1 August 2014.

<sup>411</sup> 北京宣布实施居住证制度 居住证退出历史舞台 (Beijing Announced the Implementation of a Temporary Residence Permit System: Temporary Resident Permit to Exit the Stage of History), News China, 14 January 2014 [http://news.china.com.cn/2014-01/14/content\\_31187555.htm](http://news.china.com.cn/2014-01/14/content_31187555.htm) Accessed 7 July 2014.

## PART VII. TRENDS OF MIGRATION MANAGEMENT IN CHINA

### *29. De-securitisation of internal and international migration*

This chapter's outline of the recent history of China's main legislation and policies pertaining to its internal and international borders has showed a general trajectory of de-securitisation of migration management over the last thirty years or so. At the outset of the PRC, during Mao's era, the crossing of borders both of *hukou* and international migrants was viewed as a matter of security, a treason to the nation which saw the control over population mobility as a key governmental issue. Internal immobility was both a function of planned economy and a way to keep peasants out of the cities, to prevent overpopulation and social instability. During this time, the strict control of entries of foreign nationals into China was perceived as a matter of survival by the communist regime. The fact that only a small number of sympathisers with the regime were allowed into the country shows the centrality of the friend/enemy ideological distinction along which the political and private life of Chinese citizens was defined during Mao's leadership.<sup>412</sup>

At a time of ideological struggles characterising the Cold War period, the issue of immigration was more than just a tool to unite the population against the threat of foreign migration through what we described in Chapter I as a politics of insecurity. In the context of China's "passionately governmental" system of governmentality (Dutton 2009) also mentioned in Chapter I, the entry of foreigners, potentially opponents of the government, or the emigration of Chinese citizens were both perceived as a threat to the very existence of the socialist state and were deemed equivalent to the admission of its failure.

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<sup>412</sup> *Supra*, footnote 249.

As this chapter illustrated, since the Open up and Reform policy, ideological distinctions and revolutionary passions have progressively faded and have been replaced by an economic rationality aimed at maximising profits at all government levels. Within such context, the de-securitisation of internal migration took hold as rural to urban mobility began to be allowed to feed urban areas with cheap labour and fuel China's industrialisation in the urban centres. The de-securitisation of internal migration has been deeply intertwined with China's pursuit of economic development.

The chapter illustrated how this de-securitisation happened gradually. For a long time, migration from rural areas to the urban centres has been simultaneously allowed for economic reasons yet still considered a security issue, as exemplified by the fact that the practice of detention and repatriation of undocumented internal migrants has been repealed only in 2003. To this day, the practice of random police checks of residence permits can still take place during politically sensitive events. I further noted that overall, due to *hukou* reforms and the predominance of policies over laws in *hukou* legislation, irregular migration is currently perceived and sanctioned (when sanctioned at all) as a lack of administrative compliance rather than a criminal offence. This trend strikes as opposite to the EU context, where mobility into the EU is increasingly criminalised through legislation and policies.

As far as foreign nationals in China are concerned, I similarly remarked that following China's opening up to the outside world, their presence was gradually de-securitised. This de-securitisation similarly began in the 1980s, when China started to allow into the country individuals with different political views. Contrary to ideological distinctions that until the late 1970s led the government to allow only political sympathisers into the country, after the launch of economic reforms, the government began to allow the entry and presence of anybody who could be beneficial to China in some

way. This relaxation of borders towards foreign nationals was gradual.<sup>413</sup> I have further observed that sporadically, international migrants may still be labelled as threat to the Chinese nation as a tool for the government to revive national sentiments during situations of internal political unease. I mentioned earlier the occasional political campaigns targeting foreign nationals in situations of “illegal” work, residence or entry. In the whole, however, with the disappearance of the friend/enemy distinction characterising political life in Maoist China, foreign nationals appear to be currently managed as an economic opportunity for China’s socialist market economy.

In a similar vein, the emigration of Chinese nationals went from being restricted and considered treacherous to the very existence of the socialist state to being celebrated as a patriotic gesture contributing to the country’s economic development. In the whole, China’s policy of prioritising economic growth has led to a situation where the economic uses and benefits of migration – internal and international – are overtly stated in legislation and official language and this arguably makes the issue of migration less susceptible to being conceptualised as a security issue. Next section further expands on this theme, which I describe as an open economic rationale in China’s migration management.

### *30. A forthright economic rationale in China’s migration management*

This Chapter’s analysis of the main legislation and policies instituting China’s internal and external borders showed how in post-Mao’s China the transition to a socialist market economy coincided with a shift in China’s political life. From a situation of political rule based on ideological distinctions, China has moved to a mode of governmentality within which

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<sup>413</sup> For example, as I mentioned earlier, in the early period of economic reforms, a special currency for foreign nationals physically restricted the movement of foreigners within China to the hotels, shops and transportation offices that accepted it.

the pursuit of economic growth is the key orientation of policy-making. The management of China's borders has been no exception to this shift. Contrarily to what showed in the European case, where despite the deep economic underpinnings of the EU migration regime, migration and its economic uses are rarely articulated in EU policy and legal discourses, I noted throughout this chapter that a forthright economic approach to migration management has characterised instead China's migration regime over the last few decades. What is significant here is the straightforward connection between economic imperatives and the various measures - such as temporary residence permits - aimed at controlling the mobility of China's population.

Earlier in this chapter I also noted that the goal of economic growth has been at times pursued ruthlessly, for example through the direct sale of *hukou* by some local governments and bureaus in the early stages of economic reforms. I further added that current schemes such as the blue seal *hukou* (*lanyin hukou*) - the equivalent of the EU's so called blue card - obtainable through talent schemes or by making a large investment or large real estate purchase, are in fact driven by the same market logic. Differently from the EU context, the importance of the latter has been openly acknowledged in many pieces of migration legislation and policy, justifying the introduction of specific migration management measures for their role in furthering economic and social progress.

As mentioned earlier, in its early years, this way of pursuing economic growth through migration management has translated into a ruthless and open capitalisation on rural migrants, their labour and aspirations and their already scarce resources. The rationale behind this policy was, as famously stated by Deng Xiaoping during his 1992 Southern Tour, "to let a part of the population get rich first" in order to achieve common prosperity faster. The suggestion was that eventually wealth will be redistributed among the whole population, including internal migrants. In more recent times,

legislation and policies have shifted towards a more rights-oriented approach aimed at promoting migrants' rights and their wellbeing. This shift in the legislation should be seen in the context of Chinese government's pursuit of political legitimization, which currently depends on improving the living conditions of the whole of its population rather than just China's aggregate GDP as in the past. The open connection between migration control and economic gains has also possibly been conducive to the progressive acknowledgment of the economic contribution that internal migrants have made to the country.

As further illustrated in Part Three, China's market oriented approach to migration management characterises to a significant extent also the management of foreign migrants, particularly in the terms of a policy to attract high skilled, "talented" individuals and investors to boost the labour market and benefit China's economic development. The latest legal developments concerning work permits confirm a similar open economic approach in China's management of international migrants. As the case of the new work permit system for foreign workers - openly based on a governmental will to match the management of international migration with the current needs of China's labour market – exemplified. I also emphasised that legal avenues remain unavailable to low skilled labour migrants or small traders, whose lack of legal recognition generates precarious statuses which go in the same direction of filling the gaps of the Chinese labour market. While generally foreign nationals are poorly integrated as permanent residents in Chinese society, the chapter made clear that their entry and presence is at present mainly framed as an economic opportunity in official language. This is in line with the abovementioned open economic rationale characterising China's current management of both international and internal migration, which remains China's government top priority. Not only economic prosperity is at the basis of the Chinese government's promotion of a harmonious society. After the demise of revolutionary ideology and passions, economic growth in the Chinese context has turned into the main

basis for the current government's legitimacy. In this sense, the Chinese case seamlessly illustrates the Foucauldian inspired reflections on neoliberalism as a political rationality productive of political legitimation advanced in Chapter I.

### *Conclusion*

While in the EU external migration has undergone a process of securitisation as EU internal borders were erased for EU citizens, this Chapter has illustrated that China has experienced instead a pattern of de-securitisation of both internal and international migration over the last three decades. This process has been connected with China's transition to a socialist market economy. After an introduction to the Chinese legal tradition and China's legal system's current characteristics, the chapter provided a general overview of China's internal borders as demarcated by the *hukou* system. It illustrated that from a conception of rural to urban migration as a phenomenon which had to be strictly controlled, after the launch of the Open Up and Reform Policy migration management gradually shifted to an attitude of allowing internal mobility. I also showed that in spite of a general de-securitisation of internal migration, legal affiliation and welfare rights in China's largest cities remain a prerogative of the wealthy and high-skilled few.

I then moved to discuss the history of China's external borders in relation to Chinese nationals and foreign nationals. Since the first decades of the PRC until the late 1970s, the emigration of Chinese nationals was restricted and considered treacherous to the socialist state. Ever since China's economic reforms in the 1980s, external border controls against Chinese citizens have been dramatically de-securitised, to the extent that at present the immigration of Chinese nationals is celebrated as a patriotic gesture contributing to the country's economic development. In relation to foreign nationals seeking to enter the country, China's external borders have



undergone a similar opening up from a period where immigration was seen as a high security matter and only political sympathisers were allowed into the country, to one where foreign nationals are perceived as an economic opportunity and their number in the country has increased dramatically.

Part Four examined the many legal profiles bestowed upon individuals on the move by different legal categories. I noted that most of China's internal migrants are still referred to as a "floating population" (*liudong renkou*), residing in cities without a permanent legal status either as temporary *hukou* holders or as irregular "floaters". Among the main categories of *hukou* conversion, a procedure for which the majority of rural migrants do not qualify, I mentioned: state employment; "the powerful" (retired state cadres and their families); "the wealthy"; "the educated or talented" and "the second generation relocated" (Wang 2005). Legal categories of mobility across international borders include overseas Chinese, naturalised citizens, foreign workers, irregular or semi-legal migrants. The case of Beijing, the city with the most restrictive legislation on internal borders in the country, demonstrated that while in the rest of the country the opening-up to a market economy has eased mobility into the city, criteria for the acquisition of a Beijing *hukou* remain very strict. It was further revealed that even in the city with the strictest *hukou* legislation in China, the implementation of *hukou* regulations is sporadic and ad-hoc. Part Seven discussed the main trends of migration management in the PRC as they emerged throughout this chapter. It emphasised that the trajectory of de-securitisation characterising China's internal and international borders over the last thirty years has been intertwined with China's pursuit of economic development.

My investigation of the legislation and policy variably constituting the borders of China's migration regime systems suggests that despite many differences, China and the EU share similar economic underpinnings when looking at the determination of who is entitled to move, under which conditions and with which rights. These economic underpinnings, tacitly

pursued in the EU context and straightforwardly articulated in official language in the Chinese case are a symptom of the two contexts' embeddedness in a global neoliberal era. This issue will be elaborated on in the next chapter, which will discuss the outcomes of the comparative view and offer new insights on current EU migration management in the light of the Chinese comparison.

## CHAPTER IV

### **Migration management in a neoliberal era: forthright and hidden capitalisation of migration**

#### *Introduction*

This thesis provides a new perspective on the trend of securitisation of the EU external borders in contemporary Europe, and began by taking cues from a rebuttal of the common-sense notion that borders are territorial entities naturally demarcating politico-legal spaces. In its place, an operational definition of borders as shifting processes made of conglomerates of laws, policies and measures and which operate as obstacles, impediments or incentives to mobility across politico-legal spaces was proposed. With this definition in mind I set to investigate borders in the European context, where non-EU migration is increasingly securitised, through an innovative comparative perspective with the Chinese migration system.

Chapter II examined the EU migration management context in detail, beginning with an historical account. It showed how on the one hand, EU frameworks and policies have substantially erased internal borders for EU citizens. On the other, these policies have increasingly come to conceptualise non-EU migration as a security issue as a correlate of the abolition of the internal border controls instituting the EU internal market. The analysis of the main legal categories of migration in the EU revealed how despite the dominant framing of non-EU migration as a humanitarian or a security issue

in official language, its management is underpinned by a wide-ranging economic rationale.

Chapter III took the reader to China. It showed how over recent decades, internal and international migration have in general been de-securitised in the Chinese context. The historical account of China's borders and the examination of the legal categories of migration in the Chinese system highlighted that China's relative opening of migration management has been characterised by an open articulation of the nexus between migration management and the government's pursuit of economic growth. The detailed analysis of the legislation and policy variably constituting borders in the two migration systems foregrounded in both cases the significant role of economic considerations in the determination of who is entitled to move, under which conditions and with which rights.

The main goal of this final chapter is to reflect upon the main findings of previous chapters and to offer new insights on current EU migration management in the light of the Chinese comparison. Section one will recap the general convergences and divergences that emerged from the descriptive analysis of the two contexts. They include: generally opposite trajectories characterising the migration security nexus; perceptions and policies dealing with irregular migration; the role of humanitarian reasons and their presence in legal discourse. I will observe that instead, a pervading economic rationale characterises both the EU's and China's migration systems. Section two will zoom in on this notion of economic rationale and contextualise it with both migration systems' embeddedness within the neoliberal global economy. While the pursuit of the neoliberal logic appears to have led to an increase in the securitisation of migration in the EU context, in the Chinese context it has been conducive to an overall de-securitisation of migration as compared to the Maoist era. This difference will be further investigated in the following two sections individuating two different approaches in migration management as a result of this comparison: a "forthright economic

approach” to migration and its capitalisation in the Chinese case (Section three), and in opposition to that, a “tacit economic approach” to migration management in the European context (Section four). Section five will survey some of the theories explaining the nexus between the pursuit of neoliberal growth, migration management and security. I will argue that the comparative consideration of the Chinese case compels a rethinking of the causality normally posited between pursuit of market logic and growing levels of securitisation of migration. The comparative view with the Chinese case appears to suggest that it is specifically when the pursuit of market logic remains hidden that the issue of migration can easily be turned into a security matter. In Section six I will further explore how these two different economic approaches to migration management are a product of different historical legacies and trajectories. I will individuate what I define as the “ideological foundations” of both the Chinese and EU migration regimes. The section shall particularly focus on the European case, where the dual framing of issues of migration either through humanitarian or security concerns pervades the field of migration management.

Consequently, Section seven will posit the ambivalence of humanitarian concerns in the neoliberal setting of EU migration management. I will note that the use of the humanitarian category in migration management introduces the possibility of a somewhat moral condemnation of any movement which does not take place for humanitarian reasons. The counterpoint of the Chinese case, where the humanitarian category is not implemented and asylum seekers enter the country as economic migrants, dramatically stands as a reminder of the arbitrariness of legal categories, including the humanitarian category. I will observe that notions of protection and risk as related to non-EU migrants are ultimately still heavily influenced by economic considerations despite the human rights ideals they appeal to.

Section eight posits that humanitarian concerns contribute to the occlusion of the economic underpinnings of a migration system. I will further advance the hypothesis that migration is possibly more accepted as a legitimate activity when the economic purposes underpinning its management are made explicit. On the contrary, when economic reasons in migration management are not openly articulated in public and official discourse, the lack of transparency leads to a situation where the securitisation of migration feeds into itself, as exemplified by the EU case. I will further emphasise how even though China is a non-democratic system, its current migration management is not characterised by the levels of securitisation of migration which characterise the contemporary EU regime and this fact will beg the question of whether an open articulation of migration as an economic matter is in fact compatible with the current ideological framework grounding the EU project. The last section will close the chapter with a brief discussion of possible future scenarios of migration management in the EU and in China. I will conclude that the securitisation of migration in the EU and de-securitisation of migration in China are to be considered as cyclical trends which might endure or reverse in the future.

### *1. Diverging trends of migration management in the EU and in China*

As seen through Chapter II and III, current borders' configurations in the EU and in China and their related trends in migration management stem from different historical legacies, local conditions and institutional frameworks. The two historical outlines showed that in the EU case, non-EU migration and the EU external borders have been increasingly securitised as EU internal borders have been gradually removed for EU citizens. On the other hand, from a situation where mobility was highly restricted based on political ideology, over the last thirty years or so China's migration management has been characterised by a relaxation of both its internal and external borders. While the recent strengthening of China's international borders might point to the development of a somewhat

different trend, the current levels of securitisation of international migration in China do not compare to the levels of securitisation characterising migration management in contemporary Europe for the time being.

The work's comparative overview also exposed to two different configurations of welfare and mobility. In the case of China's internal borders, welfare benefits are "territorialised", in the sense that the provision of welfare is geographically restricted to one's legal affiliation to an administrative location which is assigned at birth. I also noted in Chapter III that while social benefits such as free education or healthcare generally remain a prerogative of local *hukou* holders, *hukou* reforms are targeted at achieving a more flexible provision of welfare in China's medium sized cities. I also observed that welfare rights in the chosen place of residence are instead granted in the cases of blue seal *hukou* and green cards for foreign nationals.

China's geographically restricted and rigid configuration of welfare is in contrast with the more universalistic welfare approach which characterises the government of populations in the EU and which includes to different degrees segments of the migrant population, as shown in Chapter II. As mentioned in Chapter I, while since World War II welfare rights have been an important instrument in governing populations and in balancing the negative effects of market economies in the European context, the European integration process and advent of the common market has nevertheless coincided with the adoption of neoliberal policies undermining this welfare tradition. Of course, the welfare systems' capacities of the two politico-legal units in comparison should also be seen in the light of different resource availability and economic status, the EU comprising a group of developed economies and China a developing country.

The comparative overview further revealed divergent perceptions of migrant illegality. On the one hand, in the European context irregular non-

EU migration is currently a central issue in political discourses, which present migrant illegality as morally reproachable and criminal. In this context, irregular migrants are portrayed as untrustworthy and dangerous individuals seeking to escape the control of the state. Of course, this depiction is intertwined with the abovementioned processes of securitisation of migration. China was an interesting case to look at because it is a politico-legal space characterised by internal borders and a migration regime within the same nation state. Because of that, the arbitrariness of different legal statuses produced by migration policy frameworks is perhaps even more apparent than in the case of nation states managing international migration. I observed in Chapter III how currently irregular internal migration is merely perceived as a matter of administrative noncompliance. This perception is further supported by the sporadic implementation of China's internal borders. I further noted that although foreign migrants are periodically targeted for their irregular status, and although the latest legislation provides for harsher punishments for irregular foreign migrants, they were not equivalent to the way in which irregular migration functions in EU migration management. In the latter, the notion of "illegal" migration is attached to negative moral judgements and is a key lever in the discourses and practices constructing migration as a security issue. It could be noted that this status of irregularity as not being criminalised may further relate to the characteristics of China's legal system, whereby policies may at times trump legislation and the latter is still to some extent perceived as an instrument of politics rather than something that is autonomous from it and a value to be upheld. Yet, as the two historical perspectives on legislation have shown, these two diverging approaches to migrant illegality are contingent and changing.

Another diverging trend was the different role that human rights and humanitarian concerns play in the two migration systems. In the Chinese context I noted how the management of international migration still lacks an asylum reception and processing system and references to human rights are



mainly absent in its policies and legislation. In contrast to that, in the current EU migration system the humanitarian category<sup>414</sup> is the main legal avenue into the EU for non-EU migrants and policies and legislation on migration always pledge observance of human rights conventions. Humanitarian concerns occupy a somewhat opposite place in contemporary China's and the EU's migration regimes. In the former, references to human rights instruments are practically absent in the legal language and lack implementation. In the latter, the humanitarian category is instead a central tool of migration management of the non-EU migrant population. Despite the lack of a legal humanitarian category in China's migration system, a similar governmental approach towards vulnerable migrants can be detected in the case of internal migrants, currently depicted as vulnerable groups in need of protection within official language and policies.

Generally opposite trajectories characterise migration management in the EU and in China as far as the migration security nexus, welfare systems, perceptions and policies dealing with irregular migration and the role of humanitarian category go. Yet, this work's comparative perspective highlighted how despite their very different historical legacies and trajectories, a prominently converging trend in both the EU and China is the economic rationale orienting migration management and migrant legal profiling. The next section elaborates on this trend as it emerged throughout previous chapters.

## *2. Converging economic rationale as a symptom of China's and the EU's embeddedness in a global neoliberal setting*

A converging economic rationale characterises both the European and the Chinese context. This work has shown that in both contexts current

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<sup>414</sup>As explained in Chapter II, the institute of humanitarian protection is distinct from political asylum - being normally granted to individuals who are deemed to have a need for protection but who do not meet the conditions for refugee status. In this chapter I will converge both under the label "humanitarian category" or "humanitarian concerns" for practical reasons.

migration legal frameworks generally entitle high income or high-skilled mobile individuals easier access to free movement and establishment compared with low-income migrants, who are generally seen as undesirable and socially dangerous to host societies. This held true regardless of the administrative level of the legislation in question (national, sub-national, supranational or local). I showed that in the EU case, legal routes into European countries are currently available only to affluent or hyper-skilled migrants, leaving the only option of irregular journeys or irregular stays to those individuals who do not meet these criteria. Chapter III demonstrated that a similar economic rationale orients both *hukou* legislation and Chinese immigration law. I noted that *hukou* conversions from a rural to a *hukou* of large cities are rare and circumscribed to a few selected categories while the majority of internal migrants in China's megacities are barred by the legal framework from acquiring a permanent legal status. Similarly, I showed how the current legal frameworks regulating international borders increasingly promote the immigration of "talents", high-skilled or wealthy foreign nationals while confining other persons to ambiguous legal statuses. In both the Chinese and EU cases I described the promotion of residence schemes through blue cards as a straightforward trade-off of citizenship rights in exchange for skills or investments.

At times, the economic rationale assumed different shapes in the two contexts. For instance, in the EU a mercantilist economic approach to migration is exemplified by Member States' reluctance to accept more refugee quotas, as illustrated by Member States' tug of war around reforms of the Dublin system. But also, the management of EU external borders and the refugee reception system have themselves become productive, a way for governments to yield profits from the management of irregular migration (Andersson 2014). In the Chinese case, a similar situation was observed where I noted that the introduction of visas and various types of migration permits have created an entire "economy of migrants" which enabled local governments to yield revenues from the business of migration (Xu 2009).

Finally, I remarked that another more traditional way in which governments profit from irregular migration is through labour markets, insofar as the lack of legal avenues of migration creates a precarious and highly exploitable labour force which is beneficial to local labour markets. We saw this, for example, in the Chinese context, where especially at the outset of economic reforms, rural *hukou* holders' lack of legal status in urban centres provided local governments with a supply of cheap labour which could be expelled in times of economic contraction based on their illegal status. I also mentioned that this condition resembles that of many irregular foreign migrants from China's neighbouring countries employed in low-skilled jobs, barred from any sort of legal recognition. This phenomenon was further observed in the EU context and particularly in the Italian case - although this happens in all other Member States - where I noted that Italy's labour market is based on an informal economy largely fuelled by irregular migrant labour. This work showed that in both contexts, migration management has been employed by governments to serve their economies, in particular from the perspective of optimising their labour markets. The joint consideration of the legislation and policies constituting borders in the EU and in China uniquely shed light on the centrality of neoliberal imperatives in the management of migrant populations, regardless of the particularities and trends characterising their local contexts.

While neoliberalism is commonly associated with schemes to promote market capitalism by maximising competition and free trade through deregulation and social policy cuts, Brown points out that these are "the inadvertent political and social consequences of neo-liberalism" rather than neoliberalism *per se* (Brown 2009: 38). Following the Foucauldian interpretation of neoliberalism already posited in Chapter I, the latter is to be conceived as that *political rationality* which both determines the consequences mentioned above and "reaches beyond the market" (Ibid, original emphasis). While foregrounding the market, this rationality crucially involves "*extending and disseminating market values to all institutions and social action*, even as the

market itself remains a distinctive player” (Ibid: 39-40 original emphasis). The previous descriptive accounts of the EU and Chinese cases showed the extent to which market values have been extended to migration policies and actions and the extent to which they do intertwine with a supposedly non-economic matter as citizenship acquisition.

Despite both contexts being characterised by a similar economic rationale, this thesis demonstrated that the two migration systems deal differently with it in official language and legislation. As substantiated in previous chapters, an open embrace of the market logic characterises China’s current migration management and highlights by contrast a less upfront pursuit of the same logic in the European case. The next two sections shall rehash the main features of these two different approaches, which would have been indiscernible if not for the descriptive comparative account of borders in the EU and China carried out in the main body of this work.

### 3. *China’s forthright market approach to migration management*

The analysis of the main legislation and policies instituting China’s internal and external borders in Chapter III discovered an open articulation of the economic uses and benefits of migration and its management in the Chinese context. This feature is in striking contrast to the lack of transparency about the economic underpinnings of migration characterising the EU context. This section revisits some of the main passages where this feature most clearly emerged in legal language and defines it as a “forthright market approach to migration management”. It then briefly discusses the possible reasons behind it.

As previously mentioned, China’s ideological transition to socialist market economy after 1978 marked a shift in its government’s mode of managing its population. From a situation of political rule based on ideological distinctions, China moved to a type of governmentality within

which the pursuit of economic growth became the key orientation of policy-making as well as the basis of its government's legitimacy. I noted that in the early 1980s, the transition from planned to market economy led to the gradual relaxation of internal mobility. Such relaxation of borders, ambivalently combining lenience and occasional restriction, was functional to satisfy the labour demands in China's developing industrial areas with cheap and easily dischargeable rural migrant labour. Chapter III showed how the goal of better suiting the needs of the new economic system was clearly stated for example in the 1985 Provisional Regulations, introducing temporary residence permits for rural *hukou* holders in urban areas. Remarkably, these Regulations begin with the consideration that, as the country has embarked on a new path of economic reforms and internal migration has developed, temporary residence permits will better "suit the needs of the new model of development".<sup>415</sup> What is significant here is the almost consequential connection between the needs of the new model development, that is, market economy, and the creation of temporary residence permits.

I further illustrated that this model of development was at times pursued bluntly, an example being the introduction of the direct sale of *hukou* by some local governments and bureaus to accumulate revenues. I nevertheless observed that schemes such as the blue seal *hukou* (*lanyin hukou*) - the equivalent of the EU's so called blue card - obtainable through talent schemes or by making a large investment or large real estate purchase, are underpinned by the exact same market logic. In fact, this market logic was openly stated in the local regulations introducing blue cards, which typically opened with statements such as "in order to better suit the needs of a

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<sup>415</sup> *Supra*, footnote 283.

construction of a socialist market economy” and “in order to advance economic and social progress”.<sup>416</sup>

I would suggest that while this open connection between migration control and economic gains has translated into an often ruthless marketisation of migration management, it has also possibly been conducive to the progressive acknowledgment of the economic contribution that internal migrants have made to the country. I noted earlier that the benefits of internal migration were first acknowledged in official language in the 1994 Temporary Regulations which for the first time recognised internal migration as a legitimate activity and shifted from a policy of “blocking” migration to a strategy of “channelling” the movement in an orderly way (Xiang 2007: 5). Another key example of this is the 2003 Notification, which emphasises the positive economic effects of rural to urban migration for both rural migrants and the economic and social prosperity of Chinese cities.<sup>417</sup> Or again, the 2006 Opinions, which stated that rural migrants working in cities have made an important contribution to the country’s modernisation and their problems have to be resolved through rights’ awareness promotion, training and employment.<sup>418</sup>

I showed in Chapter III how in recent years the blunt economic rationale which characterised China’s earlier legislation and policies has tended towards a more rights-oriented approach, aimed at promoting migrants’ rights and their wellbeing. The move towards a promotion of the well-being of rural migrants should be seen in the context of the government’s pursuit of popular support through the promotion of a harmonious society, which at the moment largely depends on improving the living conditions of the whole of its population. This governmental rationale is reflected in the words of the 2011 Notice on the reform of the *hukou* system, warning that if

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<sup>416</sup> *Supra*, footnote 289.

<sup>417</sup> *Supra*, footnote 292.

<sup>418</sup> *Supra*, footnote 295.

the various issues encountered with local experimentations of *hukou* reforms or lack thereof are not resolved in a timely manner “they will severely affect the stable and rapid development of the economy as well as social harmony and stability”.<sup>419</sup> I have also observed that while many of the government’s directives on emigration are not public, a similar economic rationale can be generally observed underpinning the government’s approach towards Chinese emigrants since the 1990s. As the analysis of secondary sources on this topic has shown, for migration state brokers emigrants are deemed as “agents of the Chinese economy and polity”, instrumental to reinforcing the bond of overseas Chinese to China, and to improving China’s reputation in their host countries (Nyíri 2005: 155-156).

Finally, this market oriented approach in China’s migration management of foreign migrants has openly manifested as a policy to attract high skilled, “talented” individuals and investors to boost its labour market and benefit China’s economic development. In this context, the 2002 Provisions on foreign investors and talents posited that a long-term and important policy in China was to attract this group of migrants “to provide services and invest in China”.<sup>420</sup> This goal was furthered with the envisioning of a “Thousand Talents Plan” which began in 2008, aimed at recruiting foreign individuals who can advance China’s economic position internationally and strengthen economic and social progress internally”.<sup>421</sup>

The 2013 Exit Entry Law confirmed the governmental will to facilitate the entry of “foreign talents”<sup>422</sup> by introducing a special visa category for them and envisaging easier avenues to permanent residence.<sup>423</sup> Similarly, in a 2016 Opinion furthering the reform of the permanent residence system as

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<sup>419</sup> *Supra*, footnote 300.

<sup>420</sup> *Supra*, footnote 343.

<sup>421</sup> *Supra*, footnote 345.

<sup>422</sup> *Supra*, footnote 350, Art. 16 and 31.

<sup>423</sup> *Supra*, Art. 47.

the main strategy to attract more foreign talent,<sup>424</sup> it is stated that in the future, market forces will be an “essential factor” in the assessment of the notion of foreign talent.<sup>425</sup> The same market logic structures the Pilot Implementation Plan of the Work Permit issued in late 2016.<sup>426</sup> As the Plan makes clear, the new work permit system for foreign workers is based on the principle of “encouraging high-end talents, controlling ordinary foreigners, limiting low-end foreigners”.<sup>427</sup> These latest legal developments are exemplary of the governmental will to match the management of international migration with the current needs of China’s labour market. In Chapter III it was observed that while most international migrants in China are managed as an economic opportunity, the latest legislation does not provide for legal avenues for low skilled labour migrants or small traders and has introduced increasingly restrictive measures to tackle irregular conditions. In this domain, China would resemble the EU situation, where the lack of legal recognition renders migrant labourers more precarious and at the same time more attractive for host labour markets.

The Chinese government’s straightforward view of migration as an economic matter directly contrasts with the EU context, where currently migration is predominantly framed either as a humanitarian or a security issue. China’s approach could be framed as a “straightforward approach” to migration management in relation to the economic uses of migration management. What could be the reasons behind such open an approach? My account of China’s borders has shown the coincidence of the latter with the country’s transition to a market economy. It could be further speculated that insofar as the latter was a new system which depended on the establishment and maintenance of certain conditions, clarity about market needs in policies and legislation was fundamental for the central government

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<sup>424</sup> *Supra*, footnote 358.

<sup>425</sup> *Supra*, subsection 3 (8).

<sup>426</sup> *Supra*, footnote 360.

<sup>427</sup> *Supra*, subsection 2.



to fully master such a model and to guide the action of local governments. This was especially visible in the legislation on internal migration. Chapter III further showed that while the governmental approach towards internal migrants was initially characterised by a blunt capitalisation on rural migrants' movement, in more recent times the government's economic-oriented approach has become more nuanced and increasingly concerned about migrants' rights and well-being as a corrective to the growing inequalities produced by the blunt pursuit of profit of the early reform period. The account of governmentality put forward in Chapter I similarly highlighted the role of the welfare state as a key tool for governments in the European context in fostering their power by way of promoting the well-being of the population in a context of market economy.

With the Chinese case as a counterpoint, the next section discusses the EU "tacit market approach to migration management", where the market economy system has been in place for a longer period and has traditionally been paired with the welfare state system.

#### 4. *The EU's tacit market approach to migration management*

The comparative argument running throughout this thesis is that Chinese migration management uniquely highlights how current migration management in the EU, characterised by increasing levels of securitisation of non-EU migration, lacks an open articulation of the connection between migration management and its economic underpinnings. Instead, migration management in the EU is predominantly discussed and tackled either through the language of humanitarian concerns or that of security discourses. This section examines closely what I describe as a "tacit market approach" characterising EU migration management.

As emerged from the analysis of EU and Italian legislation in Chapter II and the consideration of the Chinese case, the EU migration system presents

deep economic underpinnings in spite of the lack of a forthright enunciation in legislation and official language, as compared with the Chinese case. Tracing the ambiguous articulation of the nexus between migration and its economic uses in the EU is thus by definition a harder a task. Chapter II nonetheless revealed this nexus through the analysis of the history of EU borders and the current categories of EU's migration management. The economic underpinnings of the EU's migration regime were exemplified by the fact that the mobility of EU citizens was at its beginnings conceived as a function of the construction of a single European market. I noted that to this day, a financial means test for economically passive EU citizens internally migrating is in place. Most notably, economic underpinnings impacted on the categorisation of the mobility of non-EU nationals and their levels of dangerousness. Chapter II posited how the label of "threat" to the internal security or cultural identity of Member States differentially applied to non-EU citizens according to their economic worth. I mentioned the fast-track permanent residence status granted by many Member States to non-EU investors based on their monetary contribution to the local economy. While currently legal routes into European countries are available to affluent, hyper-skilled individuals and family members, and legal recognition is granted to asylum seekers who are lucky enough to make it into the EU space, most non-EU migrants are left with the only option of irregular routes and irregular work and are criminalised.

The logic emerging from the current legal framework is that migrants who do not possess the skills or capital in high demand are highly undesirable and threatening for EU societies. Despite this, all national markets in the EU continue to profit from cheap and readily exploitable irregular migrant labour. The economic rationale is further underpinning migration management in the way labour migration is generally managed at the national level through criteria of skills fulfilment, labour market test (fall within the needed quotas), wage (admitting only those paid over a certain wage). I noted that an exception to the lack of articulation of migration and

its economic uses in official language is the articulation of the need for legal labour migration by the EU Commission since the early 2000s. As documented by Hansen, in several official documents the Commission solicited EU Member States to open legal avenues for migrant labourers motivating this with the fact that millions of non-EU workers will be increasingly needed to sustain the current levels of welfare in EU countries, given their shrinking working-age population (Hansen 2010, 2016, 2017). This aspect was again reiterated by the Commission in the 2015 Global approach to migration, which in spite of its prioritisation of a view of migration in the EU in terms of humanitarian emergency and as a security matter, notes that as the decline of the EU's working age population advances, "[m]igration will increasingly be an important way to enhance the sustainability of our welfare system and to ensure sustainable growth of the EU economy".<sup>428</sup> It is significant that the Commission is raising this matter, even if for now the issue remains a statement of purpose rather than a policy guideline.

I also mentioned that the prioritisation of migration as a humanitarian emergency or as a security matter has fed into what has become a profitable industry – encompassing preventive operations, search and rescue operations, processing centres, detention centres and so on (Andersson 2014). Governments, defence contractors, aid workers, NGOs would all profit from the macroeconomic stimulus produced by the management of irregular migrants. The pursuit of this economic rationale in migration management was confirmed in the Italian case, where based on low numbers of actual expulsions, scholars have argued that migrant detention centres are aimed at regulating the speed of migrant entry to the labour market (Mezzadra 2006: 109-110).

While the pursuit of market economy in the context of EU migration management can be identified from all these examples, the detailed analysis

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<sup>428</sup> *Supra*, footnote 128, p.14.

of the legislation in Chapter II disclosed that it is not an apparent policy goal as in the Chinese context but remains in the background rather than being forthrightly enunciated. In its place, I showed that non-EU migration is tackled predominantly through humanitarian categories or alternatively security concerns. One might at this point wonder why this is so. One hypothesis could be that differently from China, the EU has been characterised by a market economy system for a long time, therefore this system is taken for granted and makes its open articulation unnecessary. Another supposition is that governments at the national level do not dare articulate the connection between economic growth and migration and prefer restrictive agendas so as not to antagonise certain segments of national publics unwilling to accept more international migrants. It could be also argued that the lack of articulation of migration and its economic uses is instead itself part of a hidden agenda to maximise profits from irregular migrant labour. Regardless of the answer to why governments' capitalisation on migration is not openly articulated in the EU context, as this thesis' comparative outlook showed and as outlined in this section, the EU migration regime has deep economic underpinnings which derive from its embeddedness within the global neoliberal economy.

Whether in the form of a tacit or in that of a straightforward approach, in both contexts the market approach can be understood, as posited earlier, in the broader terms of a neoliberal political rationality where market values exceed the field of the market and extend to institutions and social actions. Neoliberal practices and imperatives express a set of practices which are aimed at the accumulation of capital. The next section reviews some of the main theories which have connected global capitalism and migration management and reflects upon the different repercussions that these two economic approaches have on the phenomenon of the securitisation of migration.

5. *Migration management and the securitisation of migration in a neoliberal era*

Previous sections posited that the different ways in which economic growth is pursued through migration management in the EU and in China, demonstrated for example by both systems' race for global talents and investors as well as their differential inclusion of low waged migrants to profit their labour markets. The last two sections have further examined how in the Chinese case the pursuit of an economic rationale was openly stated while in the EU context, the economic rationale remained in the background to the advantage of security and humanitarian categories. This market approach to migration is a symptom of the two being situated in a context of neoliberalism and global capitalism. This section surveys some of the main theories focusing on the nexus between migration management and global capital. As will be seen, most of these theories, which are based on empirical evidence from countries in the global North, tend to see a causal relationship between neoliberal economic rationale and increasing securitisation of migration. I will posit that the comparative consideration of the Chinese case, where the open pursuit of market economy has led to a de-securitisation of migration, compels a redefinition of such causal relationship in the more specific terms of a causality between hidden market economic rationale and increasing securitisation. In other words, the Chinese case suggests that it is specifically when the pursuit of market logic remains hidden that the issue of migration can be easily turned into a security matter.

The connection between migration management and global capital has received a few interpretations from different disciplinary perspectives. For some scholars the securitisation of migratory movements has been triggered by the perceived loss of control by national governments in the face of global capitalism. This perceived loss of control would have invested migration laws and their enforcement with the status of "last bastion of

national sovereignty” (Dauvergne 2008: 47, Brown 2014). Others have questioned this reading, which separates the decisional power of the state from neo-liberal considerations already orienting its policies. As migration management is already oriented by neoliberal considerations – namely, what is good for the global economy is good for the national state – migration management and border controls ought to be considered as “an instantiation of the neo-liberal Empire” rather than an instantiation of national sovereignty (Amaya-Castro 2012). Within this context, migration legislation and policies would have ceased to be an expression of nation states “sovereign right” to protect their borders and should rather be seen as the nation state’s contribution to the development of that very same globalisation of the capitalist system (Ibid). Economic considerations in migration management – which in developed countries are most evident in nationality and visa policies attributing more mobility capacity to nationals of developed countries and individuals with “higher skills” – would be contributing to the development of a global regime of social differentiation of migrants (Amaya-Castro 2017). Through the criteria of nationality and higher skills, economic globalisation would cut through national citizenship, enhancing the differentials in economic worth of different segments of the world’s population (Ibid: 95). In this context, national borders appear as dividers of people into distinct national populations and a specular international state system which functions as a “dispersed regime of governance” of the larger world’s population (Hindess 2000: 1494). As the Chinese and European cases demonstrated in this work, national citizenship is one among many modalities (i.e. *hukou* and EU citizenship) in which the world population is socially stratified and governed within and across political spaces.

This dispersed regime of governance of the world’s population heavily reliant upon economic considerations does not have a head or a sovereign as already remarked in this work drawing on Foucault’s interpretation of neoliberalism, as a political rationality which reaches beyond the market and

entails an extension and dissemination of market values to all institutions and government actions as well as a depiction of the individual as a *homo oeconomicus* (Foucault 2008).<sup>429</sup> As Geiger and Pécoud have noted, the neoliberal type of rationality cannot only be found in Chinese or EU migration management but can also be observed among the policies of international agencies such as the International Organisation for Migration (IOM) (Geiger and Pécoud 2010). On the one hand, policy and legal frameworks at the national or regional level tend to tackle migration with the goal of maximising the interests of the nation or supranational entity in question while on the global level international organisations take into consideration the needs and welfare of both origin and destination areas (Kalm 2010: 22). On the other hand, the global policy discourse on migration by international agencies remains embedded in economic considerations (Ibid). While such agencies advocate internationally for migrants' well-being and assist global migration out of technical and humanitarian concerns, their solutions remain grounded on a neoliberal rationality which aims to regulate the supply of labour migrating from poor areas to the demand for migrant labour in rich areas of the globe (Geiger and Pécoud 2010: 14; Walters and Andrijasevic 2010).

The connection between migration management and global capitalism has received further interpretation by a group of scholars drawing on a Marxist autonomist framework, as a part of the theory of an “autonomy of migration” (Moulier Boutang 1998, Mezzadra 2006, Mitropoulos 2007, Papadopoulos, Stephenson and Tsianos 2008, Karakayali and Rigo 2010, De Genova and Peutz 2010, Mezzadra 2011, Papadopoulos and Tsianos 2013, Mezzadra and Neilson 2013). The theory moves from the centrality of labour markets in shaping political configurations and observes how in the

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<sup>429</sup> One of the few hasty allusions Foucault makes to migration precisely relates to his application of the neoliberal perspective to the phenomenon of migration by equalling migration to an investment, and the migrant to an investor (Foucault 2008: 130).

current condition of global capitalism, (irregular) migration – as an endless reserve of exploitable labour below national minimum standards - has become “one of the main forces in the production and reproduction of capital” (Papadopoulos and Tsianos 2013: 180). Within this context, the role of migration controls would not be to stop mobility but rather, “to make different time registers of the entry in the productive sphere along the path of mobile populations compatible”. More specifically, the main function of migration control would be “to render the speed of absorption into the local labour markets compatible with the speed of flows of mobile populations” (Ibid). According to this perspective, the main goal of migration regimes – including their practices of detention, asylum reception and so on – would not be blocking migration but rather, institutionalising it by regulating its speed and scale (De Genova and Peutz 2010, Papadopoulos and Tsianos 2013).

The assumption of this theory is that migration constitutes a creative and unpredictable force which always exceeds full control by governmental policies and the supply/demand structure characterising national labour markets. Migrants, and particularly irregular migrants, would possess an inherent potential to subvert the sovereign order according to which borders are governed, for their agency escapes and precedes the control of sovereign order and its framing of migration into categories (e.g. legal/illegal, asylum seeker, high skilled labourer and so on). The figure of the irregular migrant worker would fully embody and at the same time advance/exceed the struggle between oppression and would embody subversion under conditions of global capitalism (Mezzadra 2006, 2010 and Mezzadra and Neilson 2013). The thesis of an autonomy of migration emphasises the social and subjective features of mobility before the aspect of migration



control and sees migration as “a political movement and a social movement” (Papadopoulos and Tsianos 2013: 184).<sup>430</sup>

According to this perspective, the connection between migration management, global capital and the securitisation of migration in the EU and in other countries of the global North is overdetermined by market forces: the “irregularisation” of migrant labour would create an unlimited supply of cheap and exploitable labourers who due to their outlaw status can be discarded and replaced with fresh migrant blood whenever turning disobedient or more demanding (De Genova 2011). Compared to the vision that the pursuit of the EU common market has spilled over into an increasing securitisation of migration (Huysmans 2006), as posited in Chapter II, this reading lays more emphasis on labour markets and their centrality. Yet both these theories agree on the existence of a link between the pursuit of market economy and securitisation of migration.

Nevertheless, as anticipated earlier the consideration of the Chinese context – where the pursuit of a market logic has run parallel to an overall de-securitisation of the issue of migration – somewhat problematises the universal causality put forward by these theories on the link between migration management, pursuit of economic profits and securitisation of migration. These theories are informed by the observation of contemporary migration regimes in the global North. The inclusion of China’s migration system in the picture thus compels a redefinition of this causal relationship between neoliberalism and increasing securitisation of migration in the more specific terms of a causality between a *hidden* market economic rationale and growing levels of securitisation. To put it differently, the Chinese case,

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<sup>430</sup> Similar to these perspectives, I see human mobility not as an object of migration laws and policies but a phenomenon which, as an agglomerate of individual decisions, has political agency and impact on governmental frameworks. Differently from the autonomy of migration theories, I do not see contemporary migration as an organised or coordinated movement, despite the occasional struggles that bring together groups of migrants around particular issues.

where the open pursuit of neoliberal economic growth has been conducive to a de-securitisation of the issue of human mobility, indicates that it is specifically when the pursuit of market logic remains hidden that the issue of migration can easily grow into a security matter.

As this work's comparative perspective has shown, the pursuit of neoliberal growth in migration management can produce opposing outcomes as far as the migration and security nexus are concerned. These outcomes are products of different historical legacies and trajectories which have been sketched in previous chapters. The following section foregrounds these legacies and discusses their mutual implications. This will lead me to bring out and make explicit the ideological foundations of the politico-legal system underlying migration management in Europe as opposed to those underlying the Chinese system.

#### 6. *Migration management, neoliberal imperatives and ideological foundations of the EU space*

As set out in earlier sections, China's forthright economic approach in migration management stems from a specific historical legacy and coincides with China's transition from planned to market economy. This transition further entailed a shift in the governmentality of the population: from a political setting ruled along the lines of ideology and friend/enemy distinctions to one where the pursuit of economic growth became the country's main policy goal. As seen in the introductory part on China's legal system, while Marxism remains the official ideology and official language, the political and revolutionary passions which characterised the Maoist era have given way to the legitimisation of the pursuit of self-interest and profits at both the individual level and at all levels of government. I noted how economic performances and continuous growth have possibly become the main basis for the current legitimacy of China's one-party state. This situation, where government bases its grounds for survival on economic

performances is different from what grounded the state during Mao's era: a socialist ideology deployed against the evils of capitalism at home and internationally. The prime role that economic growth has come to occupy in the governmentality of China's population has invested its migration management and is arguably the main reason for why China's migration system displays a forthright market approach. For the introduction of market economy and its principles had to be clear and explained to all levels of government and to the population itself. I also remarked at various stages in this thesis that differently from the European context, the doctrine grounding China's legal system is characterised by the absence of human rights discourses and China's upholding of the principle of non-intervention in other countries' internal affairs. This ideological stance is translated in the lack of humanitarian categories in China's contemporary migration regime. Finally, in the Chinese context the mobility of internal migrants is determined within an openly discriminatory framework which establishes the distinction between rural and urban citizens and attributes differential rights to each group.

The comparative outlook on the Chinese case highlights by contrast the central role that humanitarian categories and human rights discourses hold in current EU migration management. Not only are humanitarian categories currently the main avenue to enter the EU,<sup>431</sup> in the Union, the legislation and policies governing non-EU migration management are often allegedly framed on the basis of humanitarian concerns and their preambles normally reference human rights obligations. I suggest that this feature is a direct consequence of the European politico-legal tradition, which ostensibly holds notions of human dignity, freedom, democracy, equality, the rule of law and respect for human rights as the founding principles of the Union's polity

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<sup>431</sup> I include family reunification among the definition of humanitarian, insofar as the right to family life is a human right according to various international conventions.

and of its legitimacy.<sup>432</sup> It should be noted that although applying to the European space, these ideals are assumed to be “indivisible and universal” or have at least a universal aspiration.<sup>433</sup> The same universal ambition seems to apply to the notion of freedom of movement within the EU and together with the ideals mentioned above, could be individuated as the main ideological tenets of the EU politico-legal space.<sup>434</sup>

Despite the universal aspirations of the ideals through which the European politico-legal project defines itself, the analysis of legal categories and policies in previous chapters showed that the management of migrant populations in the European space enacts severe institutional exclusions and stratifications, Third Country nationals being the most severely affected by such exclusions. I also noted that all the legislative measures which have advanced the trend of securitisation of non-EU migration did refer in their preambles to the EU’s fundamental rights commitments and ideals and the securitisation of non-EU migration happened regardless of them. My analysis further stressed the different degrees of enjoyment of citizenship rights enacted by EU borders. At the extreme end of the governmental spectrum, these coincided with the deprivation of the very right to have rights, as exemplified in the case of administrative detentions of irregular migrants and Member States’ push back policies at sea. The differential treatment of individuals was further seen in the restriction of freedom of movement within the EU space, particularly criminalised in the case of the Dublin system through the so called first country rule, severely restraining

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<sup>432</sup> These principles are for example stated in the preamble to the Charter of Fundamental Rights of the European Union. EU Council and Parliament, Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/391.

<sup>433</sup> *Supra*, preamble.

<sup>434</sup> The adjective “ideological” is normally not employed by scholars and policy makers to define the EU space for it carries a negative connotation, as a set of rigid, undemocratic normative beliefs. Yet, as also observed in the introductory part on China’s legal systems, liberal democratic systems also function within the limits which are related to what is considered a major threat for the stability of the politico-legal unit in question.

the mobility of asylum seekers within the Union to their first country of entry.

The perspective on China's migration regime and the market economy discourse which openly grounds it highlights by contrast the European context as one where the legitimacy of the regime is based on a discourse pledging universalist ideals and equal rights for all. In this context, in spite of the system's differential granting of citizenship rights and the criminalisation of certain non-EU migrant groups, neoliberal imperatives are not pursued in a straightforward fashion. As shown in Chapter II, the neoliberal goal of optimising labour markets through different types of migrant labour passes more subtly through the way in which legal categories of migration are defined and implemented. The lip service so to speak, to the values mentioned above combines with Member States' hidden capitalisation on migration. The ideological foundations and the narrative of the EU as a space of equal rights for all contribute to the occlusion of the economic underpinnings of EU migration management.

This hidden economic rationale orienting migration management in the EU to the advantage of humanitarian discourses, which then have a central role in the official language, has repercussions on the way in which movement of different categories of people is constructed as legitimate or criminal. One key example of this is the distinction between "legitimate" economic migration (that is, investment or hyper-skilled migration) and dangerous, illegitimate economic migration. Another ambiguous dichotomy is that between asylum seekers and dangerous, economic migrants disguised as asylum seekers, whereby the first one is the object of protection and compassion and the other is once again considered as a dangerous and opportunistic individual. While of course the implementation of such legal categories greatly varies according to national and local interpretations, it has created across the European space a situation whereby some migrants (i.e. "real" asylum seekers, investors, hyper skilled individuals) deserve

humanisation and rights, while the others do not and exist as a security matter which threatens the stability of the EU space. This security connotation justifies the fact that irregular migrants can have less or no rights at all, in a space which can thus continue to present and even perceive itself as a champion of equality and human rights for all.

China's current migration system is strikingly different, being openly based on the acknowledgement that internal migrants are not entitled to the same rights as city-born dwellers in metropolises and openly endorsing neoliberal imperatives. Perhaps paradoxically, the combination of the open lack of formal equality with an upfront pursuit of market economy in the Chinese context has had as a somewhat ironic consequence the recognition of movement to improve economic conditions as a legitimate act and of internal migrants' contribution to China's growth. On the contrary, the current ideology grounding the EU space creates a situation whereby Member States' governments either save victims and recipients of compassion or reject "dangerous" economic migrants or bogus asylum seekers. At the same time, nonetheless tacitly following neoliberal imperatives, economic migration is only considered legitimate when migrants possess high levels of resources or social capital required to optimise local labour markets. Due to the centrality of human rights and equality discourses grounding migration management in contemporary EU, the fact that the majority of current non-EU migrants enter European labour markets on an unequal footing – as either a recipient of humanitarian compassion or as an exploitable and precarious irregular – goes unnoticed.

The dual framing of issues either through humanitarian or security concerns seems to pervade current migration management of non-EU nationals. This two-fold scheme does not leave much room for other statuses in between. At this point, one might wonder what exactly is the relationship between these two opposed yet coexistent ways of framing migration and what is their relationship with the growing securitisation of

migration in the EU as it was acknowledged in this work. The next section explores this connection between security and humanitarian concerns in the EU migration regime in the light of the observation of China's migration regime.

### 7. *The ambivalent relation between humanitarian and security concerns*

In renditions of public discourses, humanitarian protection and political asylum are legal institutions which virtuously put the lives and dignity of human beings before governments' national interests. The idea being that the granting of political asylum or humanitarian protection is a non-political and magnanimous act by governments. In the EU, one level of critique of such discourse denounces the conduct of some Northern European Countries in particular, reluctant to have an equal share of asylum seekers, disproportionately forced to remain in Southern European Countries sharing borders with Third Countries due to the first country of asylum rule. Interestingly, in mid-2015 for a short period of time Sweden and Germany experimented with an opening of their countries to larger quotas of asylum seekers and refugees' admissions to fill their labour market gaps actual and projected.<sup>435</sup> Yet, both countries revoked such policies after a few months, claiming they were not sustainable allegedly due to growing public intolerance towards asylum seekers.<sup>436</sup>

For Hansen, such policies were implicitly meant to address the abovementioned demographic gap the EU Commission has been warning about since the early 2000s and were in truth revoked due to the neoliberal austere framework constricting public spending in the EU (Hansen 2017, unpaged). In order to challenge "refugee austerity" in the contemporary EU,

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<sup>435</sup>Kirk, L. "German and Swedish leaders welcome migrant", EU Observer, 8 September 2015 <https://euobserver.com/beyond-brussels/130162> Accessed 10 September 2017

<sup>436</sup>"Germany tightens refugee policy as Finland joins Sweden in deportations", The Guardian, 29 January 2016 <https://www.theguardian.com/world/2016/jan/29/germany-tightens-borders-as-finland-joins-sweden-in-deporting-refugees> Accessed 10 September 2017

the German and Swedish governments would have had to get away with the EU's regime of fiscal austerity at large, as the reception of refugees would necessitate large initial public investments (Ibid). Moreover, according to the same neoliberal logic, refugees would be the wrong type of migrants with which to solve the EU's demographic deficit: the market-optimising being mobility in the form of temporary or circular workers rather than an "embedded, capacious form of refugees put on paths to citizenship" (Ibid). The intertwining of the management of humanitarian protection with neoliberal imperatives is once again apparent.

While the criticism of the attitude of some Northern European Member States is relevant and apt, if one stops at the level of states' behaviour, it could be wrongly concluded that the way to go is thus the model of Southern European States which would be doing the right thing (although compelled by the Dublin system). This reading however fails to see how the humanitarian category is also instrumentally employed in Southern European States within the contemporary EU migration regime. For it does not account for the fact that as any legal access to economic migration has been closed in the EU, including in Southern EU countries, most non-EU migrants are compelled to present as asylum seekers in all cases. This aspect differs from the Chinese system, where as previously discussed the humanitarian category is not even a possibility on the legal spectrum. Paradoxically, someone who moves to China seeking shelter from political prosecution will probably do so by presenting herself as a tourist or a labour migrant as humanitarian protection is not even an option on the legal spectrum. Conversely, the lack of access for economic reasons into the EU turns humanitarian protection into the only option to be legitimately present in the EU space: by presenting themselves as victims of political prosecution or other atrocities. The alternative is to be criminalised as irregulars and dangerous individuals.



Drawing on evidence from the French context, Fassin has argued that humanitarian concerns have turned into a central device for governing the migrant population: one where their legal and political status is granted out of compassion (Fassin 2012). While the notion of compassion for the suffering of others in Western morality is rooted in Christian doctrine (although of course it is equally central in all other religious traditions), he draws attention to the fact that the deployment of moral sentiments has become a distinctive feature in contemporary Western politics (Ibid: 1).<sup>437</sup> Humanitarian government, warns Fassin, is ambiguous because it establishes an asymmetrical relationship between government and objects of compassion:

[t]he asymmetry is political rather than psychological: a critique of compassion is necessary not because of the attitude of superiority it implies but because it always presupposes a relation of inequality. Humanitarian reason governs precarious lives: the lives of the unemployed and the asylum seekers, the lives of sick immigrants and people with Aids, the lives of disaster victims and victims of conflict—threatened and forgotten lives that humanitarian government brings into existence by protecting and revealing them. When compassion is exercised in the public space, it is therefore always directed from above to below, from the more powerful to the weaker, the more fragile, the more vulnerable—those who can generally be constituted as victims of an overwhelming fate (Fassin 2012: 5)

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<sup>437</sup> A key example of this in French immigration law was the 1998 introduction of an illness clause, allowing residency status for humanitarian reasons to irregular Third Country migrants affected by life threatening illnesses, while at the same time the main avenues to labour migration and asylum in France were restricted (Fassin 2005, 2012).

Humanitarian government through compassion and morality dangerously move migrants' rights from the sphere of the political to that of compassion. In this way, their rights and legitimate status are transformed into paternalistic acts of generosity by governments in the EU. At the same time, migration for economic or other reasons is increasingly viewed as illegitimate and criminalised. With its alleged neutral status and universal aspiration, the humanitarian category is ambivalent: for it can deprive the other of such quality and lead to the most extreme forms of its negation. As Carl Schmitt notably remarked as early as 1921,

[t]he concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat. To confiscate the word humanity, to invoke and monopolise such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity." (Schmitt 2007: 54).

While the Schmittian insights have been employed to criticise notions of "just war" waged in the name of humanitarian motives (Zolo 2000), I suggest that they can also be applied to the humanitarian feature of current EU management of migration as highlighted through the comparison with the Chinese context. Schmitt's considerations on the use of the notion of humanity in the political realm foreground the dangers of universalist presumptions, which can result in a total expulsion from the politico-social realm of whoever is not included within this category in a way which is more severe than when other categories of legal migration, such as labour migration, are employed in its place.

The predominant use of the humanitarian category in EU migration management introduces the possibility of a somewhat moral condemnation of whoever does not qualify for it. It is important to note that while on the surface this condemnation has nothing to do with economic considerations, as demonstrated through my analysis of legal categories of migration in the EU, at a closer scrutiny the ranking of migrants as desirable or dangerous for Member States remains to a significant extent based on the assessment of their economic worth. The fact that migrants' economic capital is the main *laissez passer* in case they do not qualify for humanitarian protection or political asylum is revealing of how notions of protection or danger as related to non-EU migrants are ultimately more grounded on economic considerations than on human rights ideals. The lack of a straightforward articulation of this fact in official language possibly contributes to the preservation of the self-narrative of the EU project as a space where ideals of equality, dignity and human rights protection come before economic considerations.

The prioritisation of human rights commitments over economic considerations in migration management is further debatable when looking at governmental actions of Member States as well as the EU institutions. Despite the proclaimed centrality of humanitarian concerns in migration management, both EU institutions and individual Member States have pursued cooperation on migration management with neighbouring Third Countries with problematic human rights records, such as Turkey or Libya.<sup>438</sup> It should also be noted that the very lack of legal avenues to the EU

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<sup>438</sup> Reports and news articles from governmental and non-governmental organisations have warned how human rights violations are an intrinsic part of the EU-Turkey deal, enacting a system where individuals who would have a right to claim humanitarian protection are forced or returned to a country in which their safety and fundamental rights cannot be guaranteed. See for example Rankin, J. (2017) "Council of Europe condemns EU's refugee deal with Turkey", *The Guardian*, 20 April 2016 <https://www.theguardian.com/world/2016/apr/20/eu-refugee-deal-turkey-condemned-council-of-europe> Accessed 10 August 2017

is one of the main causes for why migrants embark on dangerous trips and often lose their lives, 5000 in 2016, to reach EU shores.<sup>439</sup> The absence of legal avenues to the EU can be seen as a violation of human rights, understood as that set of rights characteristic to all human beings regardless of their status – including the right to life, liberty and freedom from torture – enforced through jurisdiction.

The absence of legal avenues into the EU can alternatively be seen as evidence that the EU human rights framework is not fit as a framework of protection for non-EU migrants. As Dembour has revealed in her study of human rights violations' claims by migrants at the ECHR, even at a human rights court such as the ECHR, it has been and continues to be enormously difficult for migrants to have violations of their human rights acknowledged and condemned by the Court as compared to those made by citizens of ECHR contracting States (Dembour 2015: 1). It is furthermore noteworthy that, as observed in Chapter II, the progressive securitisation of non-EU migration illustrated earlier has taken place regardless of the constant reference in EU policy documents and directives' preambles to EU's declarations of human rights commitments.

The comparison with the Chinese migration system, openly addressing migration as an economic matter, where the humanitarian category is not implemented and even asylum seekers enter the country as economic migrants,<sup>440</sup> dramatically sheds light on the currently predominant role and consequences of human rights discourses in official language on migration. The centrality of humanitarian concerns in the management of non-EU

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Gogou, K. (2017) "The EU-Turkey deal: Europe's year of shame", Amnesty International website, 20 March 2017 <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/> Accessed 10 August 2017

<sup>439</sup> <http://www.unhcr.org/afr/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html> Accessed 10 August 2017

<sup>440</sup> Of course, this feature is not historically unprecedented in other contexts, including post-World War II Europe, where before the establishment of the legal category of refugees, individuals seeking shelter from political persecutions entered Northern European countries as workers.

migration possibly contributes to concealing the economic motivations that orient EU migration management in a neoliberal era. When not framed as victims in need of humanitarian protection, the only alternative for irregular migrants is to be framed as unwanted individuals threatening Member States' political, economic and cultural stability.

These two alternative ways of legally framing non-EU migrants in the EU are seemingly opposite and incompatible with each other. However, at a closer look, they complement each other. As illustrated in Chapter II, the granting of rights to migrants out of compassion has in fact gone hand in hand with the shutting off or limiting of other legal avenues to the same rights. On the one hand, humanitarian concerns make borders more penetrable, shaping legal channels of mobility into the EU through the right to asylum and the right to family reunification (Cuttitta 2015: 132). On the other hand, as examined in the Italian case, the strengthening of border controls and the stipulation of agreements with the EU's neighbouring countries to prevent migrants from entering the EU is presented as a way to better protect the human rights of migrants from violations by their smugglers (Ibid). The humanitarian rhetoric of increasing attention to save migrants' lives has further made restrictive border policies more acceptable to the public (Cuttitta 2017: 9).<sup>441</sup> It was also noted how irregular non-EU migrants are more easily recognised as fellow humans when they die or when they risk their lives at sea than when they simply claim the right to travel or to remain in the European space (Cuttitta 2015: 132). As exemplified by the case of humanitarian operations such as Italy's *Mare Nostrum*, humanitarian and securitarian discourses and practices are thus not opposite but in fact support each other in enforcing EU borders

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<sup>441</sup> This does not mean that humanitarian policies are to be understood as the product of calculated decisions to deceive the public with humanitarian actions while securitising and introducing more restrictive measures to curb migration. Rather, this trend should be conceived as a rather unplanned but increasing discursive appropriation of humanitarianism by governments in the field of border controls (Ibid).

(Cuttitta 2017: 15). Humanitarian operations such as Mare Nostrum further transform migrants into subaltern individuals who will not circulate as equals in the EU space and labour market:

[t]he endangered lives saved at sea, as well as the resettled women and children, deserve compassion, which strengthens the asymmetry of the relationship between hosts and guests, between generous benefactors and subaltern beneficiaries. On the other hand, subaltern subject positions are also produced through the multiplication and differentiation of legal statuses resulting from humanitarian action (Cuttitta 2017: 15).

The transformation of access into the EU for non-EU migrants as a compassionate act by Member States' governments turns their movement for any other reason into a criminal act. The Chinese example, with its lack of humanitarian channels, further substantiates this point in practice: in a context where migration is mainly conceived as an economic matter, the movement of people is restricted or relaxed based on openly stated economic considerations and consequently more easily accepted as a normal occurrence rather than an exception. With its absence of humanitarian discourses in migration management, the Chinese migration system shed new light on the ambiguous interaction of humanitarian narratives and security narratives currently pervading EU migration management. It further corroborates Cuttitta's account of humanitarianism in contemporary EU migration management just presented.

With its straightforward connection between migration and economic rationale and its lack of humanitarian categories, the Chinese migration system exemplifies how by contrast, the lack of an open articulation of the economic reasons behind migration management in the EU possibly corroborates a trend of securitisation that perpetuates itself. Of course, this

is not to imply that human rights commitments in the EU are to be discarded as mere paper requirements. At times, they do and have indeed served to denounce the misdeeds of national governments, as the *Hirsi* case mentioned in the same chapter importantly showed. What I wish to emphasise is that in spite of their emancipatory potential when vindicated in human rights courts, the impact of such commitments is presently ambivalent, insofar as they occlude the economic character of migration policies behind ostensibly neutral humanitarian reasons.

Highlighting different approaches to the question of humanitarian concerns in migration management, this comparative overview on China and the EU uniquely shed light on the limits of the human rights narratives characterising current EU migration management. Given the deep economic underpinnings of the EU system, it appears that an open articulation of migration as an economic matter may be less conducive to securitisation than a system which follows neoliberal imperatives only tacitly.

#### 8. *Political systems and the securitisation of migration*

Perhaps the most striking difference between the Chinese and the EU context from a European perspective is that the accommodation of growing numbers of migrants does not necessarily lead to politico-economic mayhem, as many politicians and observers in the EU context – and other migration regimes in the global North – would have. China's tendency of de-securitisation of migration, characterised by a straightforward economic approach in migration management, stands as an alternative answer to the dominant equation currently characterising the European context that more migration needs more security. The comparative outlook based on the Chinese context suggests that when politico-legal systems are straightforward about the economic function of migration, they are less likely to turn the issue of migration into a matter of security. The study of China's borders is a counterpoint to reflect upon the way in which borders

in the EU are currently managed: in contemporary Europe, security tends to call for more security in spite of human rights discourses. In contemporary China instead, the open acknowledgment of neoliberal imperatives in migration management has for now led to an overall de-securitisation of the issue of migration.

The comparative outlook further begs the question of whether the liberal-democratic ideological framework has a role in the lack of articulation of governments' capitalisation on migration in the EU. More specifically, is an open articulation of migration as an economic, rather than a security or a humanitarian matter, compatible with the EU's ideological framework? No matter what the answer is to this question, this comparison has revealed the impact of the ideological edifice on which European liberal-democracies base their government of populations as one which combines human rights and security discourses with hidden economic underpinnings. This edifice distinguished itself from the style of government of the population characterising contemporary China - an authoritarian political system which openly pursues economic growth as its main policy goal and currently derives its political legitimation from the growing of economic resources to improve the economic conditions of its population.

On the subject of political systems, the comparative perspective further illustrated that despite its non-democratic system, current migration management in China is not characterised by comparable levels of securitisation and criminalisation of migration. Despite its democratic system and commitment to human rights, the EU in some respects appears to be more of a police state than China as far as management of non-EU migrants is concerned. While an assessment of which has a better track record in respecting the human rights of migrants in the two contexts is beyond the scope of this thesis, the comparison has highlighted that in the Chinese case, migration management was characterised by more transparent policies on the economic rationale of migrant management while in the EU



context, governments' capitalisation on migration is currently occluded by a conceptualisation of non-EU migration either as a humanitarian issue or as a security issue. On the one hand, despite the lack of legal avenues to labour migration into the Union, Member States grant entry to victims of political persecution out of compassion and generosity. On the other hand, the contribution of non-EU migrants to the competitiveness of EU economies remains hidden. Meanwhile, as repeatedly noted throughout this thesis, economic worth remains a *laissez passer* and a shortcut to legal residence and even citizenship acquisition for migrants in both contexts. The contrastive view from the Chinese context examined in this work offered an alternative to what seems to have become the default mentality to think about non-EU migration in the EU, either as a humanitarian matter or as a security problem.

The current diverging trends in migration management in the two contexts – securitising migration in the EU and de-securitising migration in China – might continue or reverse. The next section discusses the possible future scenarios of migration management in the EU and in China.

#### 9. *Future scenarios of migration management in the EU and in China*

As I posited in Chapter I, insofar as it is a practice, the securitisation of migration is always a possibility for politico-legal communities which might not currently be engaged in it. While currently migration is being securitised in the EU and de-securitised in China, these trends might reverse in the future. The increasing securitisation of borders in relation to migratory movements in the global North has been explained in various ways. While as mentioned above some have attributed the securitisation of borders in the global North to the perceived loss of control by national governments in the face of global capitalism, for others it is not global capitalism *per se* but rather economic crises that trigger the escalation of the criminalisation of migration (Palidda 2011). Perceived as beneficial in times of economic

growth, migrants assume instead a negative label in times of economic downturns. The notion that the securitisation of migration is related to times of crisis – whether economic, political and social – is similarly shared by other scholars who have remarked on how migrants easily turn into a scapegoat for other problems (Melossi 2003, Bigo 2004). As a matter of fact, governmental approaches framing migration as an issue of security and crime are often ‘symbolic’, mainly aimed at generating greater public trust rather than actually attaining the declared policy goals (Parkin 2013).

Based on this hypothesis that migration tends to be securitised in times of crisis, it could be speculated that China’s current approach to migration management might reverse as a result of an economic crisis or economic slowdown. China’s spectacular growth, which has averaged 10 percent per year since the early 2000s, has more recently slowed down to about 7 percent as of 2016<sup>442</sup>. An economic crisis could reverse current trends of *hukou* reform and de-securitisation of migration. Further, a reversal of China’s current approach could be caused by political turmoil. Despite political reforms of the *hukou* system, huge disparities still exist between rural migrants and residents of China’s largest metropolises, where the *hukou* system seems to have evolved into a system of city walls around China’s largest and richest urban centres.

As seen in Chapter III, while since the 2000s the government has been increasingly concerned with the welfare of migrant workers and is increasingly encouraging them to vindicate their rights, this might not be enough to secure their political consensus. Moreover, it remains to be seen whether immigration will remain a marginal issue in Chinese politics. As remarked in this thesis, foreigners traditionally occupy an important place in Chinese politics and have at times been criminalised, for instance for diverting public attention away from internal political issues or for the purposes of national construction. I also noted that China’s international

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<sup>442</sup> [http://www.indexmundi.com/china/gdp\\_real\\_growth\\_rate.html](http://www.indexmundi.com/china/gdp_real_growth_rate.html) Accessed 10 August 2017

migration management is still characterised by a relative lack of integration of foreigners within Chinese society and political life. While for the moment this lack of integration has not brought about any securitisation of migration, this could change in the near future. Moreover, although too early a trend to assess, the most recent tendency to reinforce China's external borders against foreigners inaugurated by the 2013 *Exit Entry Law* – combined with the weakening of China's internal borders - could further point towards an asymmetrical convergence between the Chinese and the European space, where the erasure of internal borders for EU nationals has coincided with a substantial strengthening and securitisation of the borders towards Third Country Nationals.

At the same time, an economic spur could lead to a de-securitisation of non-EU migration in the European context, perhaps triggered by a more direct approach to the economic function of migration for EU societies. This has already been the case of Northern European countries after World War II, opening worker schemes aimed at filling labour shortages at a time of economic reconstruction with a straightforward economic approach to migration.<sup>443</sup> Of course, as mentioned at the beginning of this work, other factors do and have historically determined the closure of borders and restrictive migration approaches, such as populist waves or racism. Examples for this include the closure of borders in 1960s Britain or the most recent case of Brexit (El-Enany forthcoming 2018). Yet, one might wonder about the extent to which these closures can be actually sustained in the long term<sup>444</sup> in a neoliberal context where migrant labour is key to

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<sup>443</sup> It should be remarked however that in contexts such as the UK, worker schemes specifically targeted white European migration rather than migrants from the colonies, who were instead dissuaded from arriving and then restricted through legislation (El-Enany forthcoming 2018).

<sup>444</sup> Or rather, alleged to be maintained while allowing entry of migrants through other legal categories. In Chapter II I gave the example of post-1973 Europe, where while Southern European countries such as Italy employed amnesties to regularise migrants, over the same timeframe Central and Northern European Countries such as the UK regularised comparable numbers of irregular migrants through more lenient asylum policies (Colombo 2012: 353).

maintaining the competitiveness of local markets. In the EU context, the unlikelihood of this closure is also related to the shortages of the working age population which will hit EU Member States in the near future. As repeatedly warned by the Commission, a substantial increase in labour migration will solve the problem. As the 2015 Global approach to migration notes “...without migration the EU's working age population will decline by 17.5 million in the next decade” thus, “[m]igration will increasingly be an important way to enhance the sustainability of our welfare system and to ensure sustainable growth of the EU economy”.<sup>445</sup>

Yet again, perhaps it will be the very contradictions between human rights discourses and the reality of migration management in the contemporary EU to eventually push for a more substantial consideration and respect for the human rights of migrants. The need for more working age migrants contributing to Europe's welfare system could lead to the promotion of *ius soli* in more EU countries and perhaps even acknowledge the fact that EU Countries themselves are “nothing more than the result of multiple cross-breedings and their civilisation is deeply marked, sometimes even determined, by the contributions of migrants” (Tsoukala 2005). What constitutes contemporary European cultural identity is in flux and has been shaped by ideas and practices which have travelled with people, migrants from neighbouring and distant civilisations.

Again, non-EU migration could instead be de-securitized by a rebuttal of economic decisionism, replaced by a new conception of legal belonging to political communities which looks at politico-legal units not as units delineated by a territory naturally demarcating a sedentary population but as a de-nationalised citizenship based on domicile rather than blood or family ties (Kostakopoulou 2008: 112-122). As this thesis has illustrated, the way in which borders are being drawn by migration management in Europe and in China have to do with the way in which governmental power maintains a

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<sup>445</sup> *Supra*, footnote 128, p.14.

hold over its population and the way in which it gains legitimation from it. Citizenship based on domicile may become the only way to maintain a hold of populations in a not so far future. Should the mobility of populations increase, the granting of citizenship based on domicile could be acknowledged to be a fairer way to grant membership than the “feudal” way of granting membership by virtue of birth rights as the contemporary state system and the *hukou* system currently do.

### *Conclusion*

In this final chapter the main findings of this comparative work were presented and discussed to gain new insights on the growing trend of securitisation of non-EU migration in the European context, where this journey began and where it ends. In this chapter, the evidence emerged in the forgoing descriptive and analytical accounts of the EU and Chinese cases was dissected and recomposed into a coherent argument. In spite of several divergences, China’s and the EU’s migration regimes presented a similar economic rationale orienting their management of human mobility.

This last chapter contextualised this economic rationale as a symptom of both contexts’ embeddedness within global neoliberalism, as a political rationality which promotes the market and pervades governmental actions and policies beyond the market itself. The chapter further individuated a forthright approach to migration and its capitalisation in the Chinese case and in opposition to that, a tacit pursuit of economic rationale in EU migration management. These two different approaches were explained as the product of different historical legacies and trajectories. The discussion of such legacies led me to make more explicit the ideological foundations underpinning the governmentality of migration systems in the EU and in China. I identified the centrality of humanitarian and security concerns in current EU migration management as opposed to the Chinese context.

I noted how this dual framing of non-EU migration - either through humanitarian or security concerns - conceals the economic underpinnings of EU migration management. Although humanitarian and security concerns are seemingly incompatible with each other, I noted that in the contemporary EU they currently complement each other. By highlighting different approaches to the question of humanitarian and security concerns in migration management, the comparative overview with China uniquely highlighted the limits of human rights narratives in current EU migration management. Given the deep economic underpinnings of this system, I concluded that an open articulation of migration as an economic matter might be less likely to turn migration into a security matter than a system that is permeated by humanitarian concerns while being tacitly oriented by neoliberal imperatives.

China's inverse tendency of de-securitisation of migration, characterised by a straightforward economic approach in migration management, thus stands as an alternative - and perhaps unusual, to the European reader - answer to the dominant equation currently characterising the European context that more migration needs more security. Of course, this does not entail that migrants enjoy better rights or conditions in the Chinese context. Yet, this thesis has illustrated how, differently from the EU context, they are currently not conceptualised as a security threat. By revealing the lack of articulation of the centrality of economic considerations in the EU's current migration management, what I described as China's forthright economic approach to migration has added a new original interpretation of the current state of borders and migration management in the EU context. The comparison with China compelled to put into perspective or at least not to take as inherently good the centrality of the commitment to human rights and the rule of law framework in the EU. Acting at times as an ideological veil, humanitarian discourses in a neoliberal era possibly obfuscate the way in which current migration management grants differential access and

precarious legal statuses which translate into conveniently exploitable labour  
boosting the competitiveness of local markets.

## Conclusion

This thesis began its journey in the European space, where borders are increasingly perceived as highly charged markers of political communities allegedly under siege by herds of non-EU migrants. Against the latter, walls and fences are erected, both physical and legal. The comparison of this context with China's migration system uniquely revealed that despite the deep economic underpinnings of the EU migration regime, the pursuit of economic growth through migration management in the EU is not an outspokenly enunciated policy goal as in the Chinese context. This argument was substantiated in various stages.

Drawing on a number of theoretical insights – ranging from critical geography to migration studies and political philosophy – Chapter I began with a rebuttal of the common-sense notion that borders are territorial or natural entities. In its place, Foucault's notion of governmentality, as a new mode of operation of government in the modern era which has the population as its main target, was applied to the field of borders and migration law. I defined borders as shifting legal processes made of conglomerates of laws, policies and measures and operate as obstacles, impediments or incentives to mobility across politico-legal spaces. I also identified the notion of securitisation of migration in the EU context as a process observable within legislative measures, policies and official statements which in various ways restrict free movement and construct migrants as potential threats. I then posited a comparative perspective as the most apt method to go about my investigation and explained the “how” of the comparison, drawing attention to the epistemological biases existing when dealing with non-Western legal contexts from a Western perspective.

Chapter II first introduced to the EU internal and external borders through a recent history of legislation and policies. The account progressively identified a correlation between the increasing levels of



securitisation of (non-EU) migration, the abolition of internal border controls as well as the constitution of EU citizenship. The accounts of the history of EU migration policies and the legal categories through which migration is presently channelled exposed the deep economic underpinnings of the EU migration regime. The dynamics of the EU's external borders were further examined in one national case, Italy, whose peninsular "gate-keeper" position sharing sea borders with Third Countries makes it an interesting viewpoint from which to analyse the management of the EU's external borders. The national case confirmed the picture already observed at the European level. In all, the chapter presented a situation whereby despite its underlying economic rationale, contemporary EU migration management is mainly governed through humanitarian or security concerns which orient its legal categories and official discourses.

The narration then embarked on a journey to China, a distant context governed by a different regime of mobility and diverse tendencies. Chapter III began with the introduction to China's legal system and its main characteristics. An historical outline of the legislation and policies constituting China's internal and external borders followed, together with a consideration of the legal categories through which mobility – internal and international - is presently channelled in the Chinese context. Similar to Chapter II, the chapter included a discussion of a local case. The case of internal borders in Beijing was selected for the capital's reputation of being the one with the strictest *hukou* regulation and among the most popular destinations for internal migrants. The descriptive account of China's borders revealed how from a severe restriction of internal and international migration in Mao's era – where spontaneous migration was perceived as a security threat to the socialist state – the management of both internal and international migration in China has shifted to a more liberal approach following China's embrace of a socialist market economy. I illustrated how the de-securitisation of migration has been driven by an open, at time ruthless, pursuit of economic growth as the main policy goal. The latter has

been forthrightly enunciated in legal and policy documents. The Chinese context sits in striking opposition to the European context, which is characterised by the lack of a forthright enunciation of the connection between the pursuit of economic growth in the management of human mobility.

Chapter IV discussed the outcomes of the comparative overview on borders in the EU and in China. It underlined that one thing that these two contexts share in spite of their differences is their embeddedness within global neoliberalism in their management of borders. This manifested for example in a race for global talents, an exploitation of irregular migration to profit local economies and a general capitalisation on migration which assumed different forms in the two contexts. The pursuit of neoliberal growth has produced different outcomes in China's and the EU's migration systems, which I explained as products of different historical legacies and trajectories. In China, the de-securitisation of migration coincided with the country's experimentation with a new economic system: in this context, a market logic was openly espoused as part of the country's transition from planned to market economy.

In the EU context, where the market economy has been established for some time, I remarked that economic reasons underpin EU migration management yet they are not openly enunciated in official language. The latter is instead pervaded by security and most recently humanitarian concerns, which also dominate the legal categories through which non-EU migration is currently managed. I noted that regardless of whether this lack of articulation is an intention of political elites or an accidental outcome of Europe's historical trajectory, there is a relationship between growing levels of securitisation of migration and the EU's hidden economic approach to migration. The lack of articulation of the economic rationale feeds into the conceptualisation of movement into the EU as a security issue which is deemed legitimate only when it is framed in terms of humanitarian

protection. This finding would not have been apparent without a consideration of the Chinese case, where instead a forthright economic approach to migration management possibly produced a normalisation of human mobility for economic purposes and has coincided with China's relative de-securitisation of migration over the last decades.

Despite its hidden nature, the advancement of the neoliberal project in the EU seems to be confirmed by the latest developments of migration legislation in the Italian context. At the time of writing, a new law, so called “Minniti-Orlando” has entered into force, introducing more security measures in the management of asylum seekers and their applications and attempting to tune in this phenomenon with labour market needs.<sup>446</sup> The new law abolishes the right to a second-degree appeal for rejected applications, further expands the net of detention centres for the purposes of expulsion and introduces the duty for asylum seekers to carry out voluntary work..<sup>447</sup> The law, which received criticisms of unconstitutionality by legal experts, is another example of what in Chapter IV was described as an increasingly ordinary amalgamation of humanitarian and security concerns in EU migration management. As I have stressed in Chapter IV, humanitarian categories are ambivalent because with their allegedly neutral status they transform individuals' access and participation to the socio-economic space into a generous concession by the governments of migrant receiving states. Interestingly, the Orlando-Minniti law draws on the special status of asylum seekers as a justification for their different footing in their participation in the labour market as free labour, even if only during the time

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<sup>446</sup>Law no.46 on urgent dispositions to speed up international protection procedures and contrast illegal migration (*Legge n.46, recante disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale*), in force since 17 August 2017.

<sup>447</sup>Camilli, A. “The decree Minniti-Orlando on Immigration is Law” (*Il Decreto Minniti-Orlando e' legge*), *Internazionale*, 12 April 2017 <https://www.internazionale.it/notizie/annalisa-camilli/2017/04/12/decreto-minniti-orlando-legge> Accessed 1 September 2017

frame of their application, confirming the deep economic underpinnings of migration management.<sup>448</sup>

Although in the Chinese context economic growth is openly pursued and migration is not securitised, Chapter III illustrated how the Chinese system is also based on the stratification of the population and the benefits and exploitation of these institutional differences to profit labour markets. As a matter of fact, the relaxation of the *hukou* system created a huge inexpensive labour force ready to work for Chinese and foreign enterprises at the lowest conceivable wages and work conditions. Despite *hukou* reforms, China's internal borders are not vanishing but rather, are currently developing into a system of city walls which remains to a large extent based on location-based institutional exclusions. A similar mechanism pertains to low skilled foreign workers, who participate in China's labour market at the lowest possible wages without any legal recognition. Both in the EU and China migration management is deeply rooted in the neoliberal ideology that populations' well-being can best be promoted within an institutional framework oriented towards maximising economic growth. The assumption is that eventually, some of those economic revenues will reach those who are most affected by such exclusions. The practice with such system and ideology increasingly exposes the fact that this promise may never be fulfilled, as the neoliberal promise of well-being for everybody de facto profits some groups over others, as all ideologies.

It remains to be seen whether in the future the pursuit of neoliberal economic growth is sustainable in the long term for governments to maintain a hold over their migrant populations or whether it will have to give way to other rationales, such as economic redistribution. China's

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<sup>448</sup> One could draw a comparison between this new legal development and the category of indented labour in the United States in the XIX century, where the labour of Chinese coolies was exploited to build infrastructure after the abolition of slavery and only after years of unfree labour could they achieve freedom.

management of internal migration has somewhat hinted at a readjustment of a blunt pursuit of economic growth at all costs when it began promoting welfare rights of internal migrants to correct some of the most severe inequalities produced by the sheer pursuit of economic gains in the early reform period. The EU's welfare system is also to be seen as a corrective of the most severe effects of market economy.

It should further be added that despite the significant impact that economic considerations currently have on migration management in both contexts, the economic rationale identified in this thesis is not to be seen as an omni-comprehensive and objective process that can explain all. Rather, I see it as a subject that functions in conjunction with other factors. After all, in order to exist and produce results, neoliberal markets require government intervention and the guarantee of certain conditions, one of which is political stability and consensus. These are not always achieved through economic outcomes, although evidence from all over the world suggests that economic crises are often catalysts for political unrest. Behind economic crises there is the exacerbation of social inequalities. As I suggested at the end of Chapter IV, the future may indeed hold unforeseen reversals of the observed tendencies.

The EU and Chinese migration regimes investigated in this thesis presented us with different modes of governing populations and its mobile segments and different ways of gaining legitimation from them. At the origin of such differences this work highlighted features including different historical legacies, political and ideological constellations along with different resource availability. While the comparative perspective has shown that China's current approach to migration management is less conducive to securitisation, this is not to argue that the modalities of this approach are to be preferred or are better than the approach characterising the current EU context. I am also not suggesting that China's more open embrace of neoliberal policies is the best avenue for migration management, even if

after the demise of planned economies, neoliberalism appears to be the only economic system on the horizon for the time being. The more modest goal of this comparative work, as posited at the beginning of this thesis, has been to look through the lens of the Chinese perspective to achieve a new outlook and deeper understanding of what lies beneath, and is not otherwise apparent, in the current legal and policy trends of migration management in the EU.

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